DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 13-483
Title: Edward R. Lane, Petitioner
v.
Steve Franks, in His Individual Capacity, and Susan Burrow, in Her Official Capacity as Acting President of Central Alabama Community College
Docketed: October 17, 2013
Lower Ct: United States Court of Appeals for the Eleventh Circuit
Case Nos.: (12-16192)
Decision Date: July 24, 2013
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Oct 15 2013	Petition for a writ of certiorari filed. (Response due November 18, 2013)
Nov 14 2013	Brief of respondent Steve Franks in opposition filed.
Nov 26 2013	Reply of petitioner Edward R. Lane filed.
Dec 4 2013	DISTRIBUTED for Conference of January 10, 2014.
Jan 13 2014	DISTRIBUTED for Conference of January 17, 2014.
Jan 17 2014	Petition GRANTED.
Feb 4 2014	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioner.
Feb 11 2014	SET FOR ARGUMENT ON Monday, April 28, 2014
Feb 19 2014	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the respondent Steve Franks.
Feb 20 2014	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the respondent Susan Burrows.
Feb 20 2014	Motion to dispense with printing the joint appendix filed by petitioner Edward R. Lane.
Mar 3 2014	Brief of petitioner Edward R. Lane filed.
Mar 3 2014	Brief of respondent Susan Burrow in support of reversal in part and affirmance in part filed.
Mar 5 2014	Brief amicus curiae of Alliance Defending Freedom filed.
Mar 7 2014	Brief amicus curiae of National Whistleblower Center filed. (Distributed)
Mar 10 2014	Motion to dispense with printing the joint appendix filed by petitioner GRANTED.
Mar 10 2014	Record received from U.S.D.C. Northern District of Alabama is electronic. (Not on PACER).

Mar 10 2014	CIRCULATED.
Mar 10 2014	Brief amici curiae of American Civil Liberties Union, et al. filed. (Distributed)
Mar 10 2014	Brief amici curiae of Law Professors filed. (Distributed)
Mar 10 2014	Brief amicus curiae of Government Accountability Project filed. (Distributed)
Mar 10 2014	Brief amicus curiae of United States supporting affirmance in part and reversal in part filed.
Mar 10 2014	Brief amicus curiae of The National Association of Police Organizations filed. (Distributed)
Mar 10 2014	Brief amici curiae of National Education Association, et al. filed. (Distributed)
Mar 10 2014	Brief amicus curiae of First Amendment Coalition filed. (Distributed)
Mar 10 2014	Brief amicus curiae of American Federation of Labor and Congress of Industrial Organizations filed. (Distributed)
Apr 2 2014	Brief of respondent Steve Franks filed. (Distributed)
Apr 8 2014	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae, for divided argument, and for allocation of argument time filed.
Apr 9 2014	Brief amici curiae of The International Municipal Lawyers Association, et al. filed. (Distributed)
Apr 11 2014	Reply of petitioner Edward R. Lane filed. (Distributed)
Apr 17 2014	Reply of respondent Susan Burrow filed. (Distributed)
Apr 18 2014	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae, for divided argument, and for allocation of argument time GRANTED.
Apr 22 2014	Letter from counsel for petitioner Edward R. Lane filed. (Distributed)
Apr 28 2014	Argued. For petitioner: Tejinder Singh, Washington, D. C.; and Ian H. Gershengorn, Deputy Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.) For respondent Burrow: Luther J. Strange, III, Attorney General, Montgomery, Ala. For respondent Franks: Mark T. Waggoner, Birmingham, Ala.
Jun 19 2014	Adjudged to be AFFIRMED IN PART, REVERSED IN PART, and case REMANDED. Sotomayor, J., delivered the opinion for a unanimous Court. Thomas, J., filed a concurring opinion, in which Scalia and Alito, JJ., joined.
Jul 21 2014	JUDGMENT ISSUED

PETITION FOR WRIT OF CERTIORARI

RECORD AND BRIEFS

No. 13-483

Supreme Court, U.S.
FILED
OCT 15 2013
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

EDWARD LANE,

Petitioner,

v.

STEVE FRANKS,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the government categorically free under the First Amendment to retaliate against a public employee for truthful sworn testimony that was compelled by subpoena and was not a part of the employee's ordinary job responsibilities?

2. Does qualified immunity preclude a claim for damages in such an action?

PARTIES TO THE PROCEEDINGS BELOW

Pursuant to Rule 14.1(b), the parties to the proceedings below include petitioner, respondent, and Central Alabama Community College, a defendant-appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Edward Lane respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is unpublished. The district court's opinion (Pet. App. 9a-35a) is unpublished.

JURISDICTION

The court of appeals issued its judgment on July 24, 2013. Pet. App. 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This is a First Amendment retaliation case arising from a public employee's truthful subpoenaed testimony in a federal fraud prosecution. Petitioner alleges that respondents terminated him in retaliation for his compelled testimony at the criminal trial of a corrupt legislator who abused her position to defraud the government. Affirming the district court, the court of appeals held that respondents were completely free under the First Amendment to retaliate against petitioner for that testimony by firing him. The court of appeals expressly recognized that its decision conflicts with the precedent of at least two other circuits.

1. Petitioner is the former Director of the Community Intensive Training for Youth Program ("CITY") of Central Alabama Community College. CITY is a training program for at-risk youth that

operated in part with federal funding. This case arises from petitioner's testimony in a federal fraud prosecution brought by the U.S. Attorney for the Northern District of Alabama against Suzanne Schmitz, an Alabama state legislator. The United States prosecuted Schmitz for fraudulently arranging and concealing a no-show job for herself with CITY.

The prosecution subpoenaed petitioner to testify both before a federal grand jury and at two criminal trials. Pet. App. 12a. Petitioner truthfully testified that, in the course of an audit of CITY's finances, he learned that Representative Schmitz was receiving a paycheck from CITY—and indeed was one of its highest-paid employees—but was not doing any work for CITY. *Id.* 3a, 12a-13a. Petitioner attempted to require Schmitz to perform work commensurate with her position, including by assigning her to work as a counselor. Schmitz refused. After petitioner terminated Schmitz for nonperformance, Schmitz informed another CITY employee that she intended to "get [petitioner] back," and that, if petitioner ever sought funds for CITY from the legislature, she would inform him, "you're fired." *Id.* 2a, 11a.

In the wake of petitioner's testimony, the grand jury returned an indictment charging Schmitz with fraud in connection with federal funds and mail fraud. Petitioner testified again at Schmitz's two criminal trials (the first of which ended in a mistrial), and a jury convicted Schmitz of all counts but one. *Id.* 3a. In subsequently affirming Schmitz's conviction for mail fraud, the Eleventh Circuit explained that:

> Schmitz engaged in a calculated and extensive pattern of fraudulent conduct designed to allow her to collect a state-government salary while performing almost no work. She accomplished this scheme through demonstrably false reports and time sheets. And, when people started asking questions, she used her status as state legislator to keep the scheme going.

United States v. Schmitz, 634 F.3d 1247, 1265 (11th Cir. 2011). All told, Schmitz fraudulently obtained $177,251.82 in public funds. She was ultimately sentenced to thirty months' imprisonment, and forced to pay restitution.

Soon after petitioner testified at Schmitz's first trial, respondent Steve Franks—President of the Central Alabama Community College—fired petitioner. Pet. App. 3a. The stated rationale for the termination was CITY's poor financial status. *Id.* 14a. Indeed, CITY nominally terminated all of its twenty-nine recent hires (including petitioner) who were deemed "probationary employees." But just two days later, Franks rescinded all the terminations but those of petitioner and one other employee. CITY then replaced petitioner with a new interim director. *Id.* 3a-4a.

2. Petitioner filed this lawsuit, alleging that his termination constituted retaliation for his testimony against Schmitz in violation of the First Amendment

and state law.[1] Pet. App. 4a. Petitioner alleged that Franks terminated him as retribution for the testimony, in collaboration with Schmitz and her political allies. *Id.* 4a, 14a-15a. He sought damages and equitable relief, including reinstatement to the "position in which he would have worked absent the Defendant's retaliatory treatment." *Id.* 23a-24a.

Franks filed a motion for summary judgment, which the district court granted. The court recognized that "genuine issues of material fact exist in this case concerning Dr. Franks' true motivation for terminating Mr. Lane's employment," but it held that petitioner's claims were barred. *Id.* 21a. The district court held that petitioner's compelled testimony was not entitled to any First Amendment protection. Applying Eleventh Circuit precedent, the court explained that

> Mr. Lane's testimony did not occur in the workplace, but he learned of the information that he testified about while working as Director at C.I.T.Y. Because he learned the information while performing in his official capacity as Director at C.I.T.Y., the speech can still be considered as part of his official job duties and not made as a citizen on a matter of public concern.

Id. 29a.

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[1] Petitioner also initially brought claims against Central Alabama Community College and claims under state law. He has not pursued those claims, and they are not at issue here.

On petitioner's appeal, the Eleventh Circuit affirmed, agreeing with the district court that no constitutional violation had occurred because petitioner's speech was not protected. Pet. App. 4a. The court read its precedent to hold that subpoenaed testimony regarding facts that relate to a public employee's official duties is not protected speech because it is not made "as a public comment" on the employer's practices. *Id.* 6a (quotation marks omitted). The court explained that the fact "[t]hat Lane testified about his official activities pursuant to a subpoena and in the litigation context, in and of itself, does not bring Lane's speech within the protection of the First Amendment." *Id.* 7a. It brushed aside the fact that petitioner's "official duties did not distinctly require him to testify at criminal trials" by stating that "formal job descriptions do not control." *Id.* Instead, it deemed dispositive that petitioner had been subpoenaed to testify because he was "acting pursuant to his official duties as CITY's Director when he investigated Schmitz's work activities, spoke with Schmitz and other CACC officials about Schmitz's employment, and ultimately terminated Schmitz's employment." *Id.*

The Eleventh Circuit did not identify any court that had adopted its view of the First Amendment and acknowledged that "[o]ther circuits seem to have decided this issue differently." *Id.* 7a n.3. It cited as examples the Third and Seventh Circuits' adoption of the opposite rule that subpoenaed testimony is always protected by the First Amendment. *Id.* (citing *Morales v. Jones*, 494 F.3d 590, 598 (7th Cir. 2007) and *Reilly v. City of Atlantic City*, 532 F.3d 216 (3d Cir. 2008)).

But the Eleventh Circuit deemed those decisions inconsistent with its own precedent, and gave them no weight. *Id.*

The court further held that because no First Amendment violation had occurred at all, it necessarily followed that Franks would be entitled to qualified immunity vis-à-vis a claim for damages. *Id.* 4a n.2. Having resolved the issue solely as a matter of First Amendment law and qualified immunity, the court of appeals declined to "decide about Franks's defense of sovereign immunity." *Id.* 4a.

This petition followed.

REASONS FOR GRANTING THE WRIT

In denying any First Amendment protection to petitioner's subpoenaed testimony, the Eleventh Circuit applied a uniquely restrictive interpretation of the First Amendment. That holding conflicts with the precedents of at least three other federal circuits, as well as with this Court's holdings regarding public employee speech and the public interest in sworn testimony.

I. The Eleventh Circuit's Holding Conflicts With The Precedents Of Other Courts Of Appeals.

The Eleventh Circuit's decision denying First Amendment protection to subpoenaed testimony conflicts with settled precedent in the Third, Seventh, and Ninth Circuits.

1. In *Reilly v. City of Atlantic City*, 532 F.3d 216, 231 (3d Cir. 2008), the plaintiff police officer conducted

an internal corruption investigation and then related the results of that investigation in sworn testimony. After he was disciplined in retaliation, he filed suit. The Third Circuit held that the First Amendment's protections apply to that testimony. *Id.*

The Third Circuit reasoned that "[w]hen a government employee testifies truthfully, s/he is not 'simply performing his or her job duties'; rather, the employee is acting as a citizen." *Id.* (quoting *Garcetti v. Ceballos*, 547 U.S. 410, 423 (2006)). On its view, "[t]he notion that all citizens owe an independent duty to society to testify in court proceedings is . . . well-grounded in Supreme Court precedent." *Id.* at 229. It cited *Branzburg v. Hayes*, 408 U.S. 665, 686 (1972), which held that the so-called newsman's privilege was "outweighed by the general obligation of a citizen to appear before a grand jury or at trial, pursuant to a subpoena, and give what information he possesses," as well as *United States v. Nixon*, 418 U.S. 683, 709 (1974), which explained:

> The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.

See Reilly, 532 F.3d at 229.

The Third Circuit specifically rejected the defendants' argument that under this Court's decision in *Garcetti*, the plaintiff officer's testimony was

unprotected because it "stemmed from his official duties in the investigation." *Id.* at 231.

The Third Circuit further found that the defendants were not entitled to qualified immunity, reasoning that "[t]he protected status of courtroom testimony was clearly established" well before, and was not called into question by, *Garcetti*. *Id.* at 232.

The Seventh Circuit has adopted the identical rule that "[w]hen a public employee gives testimony pursuant to a subpoena, fulfilling the 'general obligation of [every] citizen to appear before a grand jury or at trial,' he speaks 'as a citizen' for First Amendment purposes." *Chrzanowski v. Bianchi*, 725 F.3d 734, 741 (7th Cir. 2013) (quoting *Branzburg*, 408 U.S. at 686). In *Chrzanowski*, a state prosecutor provided subpoenaed testimony against his supervisor, and was subsequently fired. *Id.* at 736-37. The court found his speech protected, and held that qualified immunity did not apply. *See id.* at 743.

The Seventh Circuit reasoned that "[c]areful attention to the reasoning behind *Garcetti*" dictated its result. *Id.* at 741. The court explained that *Garcetti*'s rule distinguishing between unprotected speech made pursuant to official duties and protected private speech rested on three bases: first, that the individual employee does not have a personal stake in speech made pursuant to official duties; second, that restrictions on speech made pursuant to official duties do not undermine the societal value of public speech, because the public employee remains free to participate in civic discourse; and finally, that a contrary approach would interject the federal courts

into garden-variety disputes between public employees and their superiors. *Id.*

The Seventh Circuit concluded that subpoenaed testimony does not implicate any of these concerns. First, "the individual person has a strong interest in complying with the demands of a subpoena: apart from whatever desire a public employee might have to assist in the administration of justice, failure to comply with a subpoena can result in lengthy incarceration." *Id.* Second, "[t]he public also has a substantial interest in hearing such speech." *Id.* at 742. Indeed, the root of the subpoena power is the notion that the "'public . . . has a right to every man's evidence.'" *Id.* (quoting *Branzburg*, 408 U.S. at 688). And finally, there is no risk that protecting subpoenaed testimony would constitutionalize employment grievances, because employers have no legitimate interest in dissuading their employees from testifying truthfully pursuant to a subpoena. *Id.* The Seventh Circuit's ruling is consistent with a settled line of that court's precedent. *See Morales v. Jones*, 494 F.3d 590, 603-04 (7th Cir. 2007) (holding that a police officer's testimony at a civil deposition for a co-worker's lawsuit was protected speech); *Fairley v. Fermaint*, 482 F.3d 897, 902 (7th Cir. 2007) (holding that the First Amendment protected prison guards who testified about prison conditions in support of inmate lawsuits).

The Ninth Circuit applies a similar rule. In *Clairmont v. Sound Mental Health*, 632 F.3d 1091 (9th Cir. 2011), the court held that the First Amendment prohibits retaliation against a mental health worker

who testified under subpoena in a criminal proceeding. The defendant argued that the testimony was pursuant to the employee's duties because "the content . . . described the nature of his duties as a contract counselor." *Id.* at 1106. Relying on *Garcetti*, the Ninth Circuit rejected that argument, explaining that public employees are the most likely to be well-informed about the subject matter of their employment, so that it is "'essential that they be able to speak out freely on such questions without fear of retaliatory dismissal.'" *Id.* (quoting *Garcetti*, 547 U.S. at 421). Because there was "no evidence that testifying in court . . . was a part of [the plaintiff's] official duties," the speech was properly regarded as private speech. *Id.* The court further rejected the defendant's claim to qualified immunity, as the relevant right had been long established. *Id.* at 1110.

Similarly, in *Karl v. City of Mountlake Terrace*, 678 F.3d 1062 (9th Cir. 2012), a confidential administrative assistant gave subpoenaed deposition testimony in a civil rights lawsuit. The court held that her testimony related to a matter of public concern, and that, indeed, it was "not a close case." *Id.* at 1069 (quotation marks omitted). The employee's testimony was properly characterized as that of a private citizen, even though "her relevant knowledge was acquired by virtue of her position" because "[w]hile [her] knowledge about certain work-related matters may owe its existence to her job as a confidential assistant, her testimony . . . does not." *Id.* at 1072. The court noted that a confidential assistant had no "duty under state law . . . to testify truthfully as part of her professional responsibilities." *Id.* at 1071 n.4. And it

rejected the defendant's claim of qualified immunity as foreclosed by *Garcetti*, holding that "a reasonable official would also have known that a public employee's speech on a matter of public concern is protected if the speech is not made pursuant to her official job duties, even if the testimony itself addresses matters of employment." *Id.* at 1074 (citing *Garcetti*, 547 U.S. at 421). *See also Dahlia v. Rodriguez*, No. 10-55978, -- F.3d ----, 2013 WL 4437594, at *1 (9th Cir. Aug. 21, 2013) (en banc) (overruling the holding of *Huppert v. City of Pittsburg*, 574 F.3d 696 (9th Cir. 2009), that a police officer's testimony regarding departmental corruption was not protected because, under California law, police officers were required to testify to grand juries as part of their jobs).

2. The Eleventh Circuit correctly acknowledged that other courts of appeals would have resolved the First Amendment issue in petitioner's favor. *See* Pet. App. 7a n.3. Under the precedent of the Third, Seventh, and Ninth Circuits, petitioner's subpoenaed testimony would have been entitled to full First Amendment protection as citizen speech on a matter of public concern. The fact that those courts have decided multiple cases specifically rejecting the rationale adopted by the Eleventh Circuit demonstrates that the conflict is intractable and cannot be resolved without this Court's intervention.[2]

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[2] This case also implicates a secondary conflict over the proper standard of review governing whether speech is made in

The Third and Seventh Circuits adopt the most protective rule, holding categorically that whenever a public employee testifies pursuant to a subpoena, the First Amendment protects the speech. *See Reilly*, 532 F.3d at 231; *Chrzanowski*, 725 F.3d at 741. As the Third Circuit explained, the First Amendment therefore applies even if "an employee's official responsibilities provided the initial impetus to appear in court." *Reilly*, 532 F.3d at 231. Here, petitioner testified pursuant to a subpoena, and under the precedent of these two circuits, his speech would be protected on that basis alone.

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the course of an employee's duty. The Eleventh Circuit held that "[w]hether the subject speech was made by the public employee speaking as a citizen or as part of the employee's job responsibilities is a question of law for the court to decide." Pet. App. 6a. The Fifth, Tenth, and D.C. Circuits agree. *See Charles v. Grief*, 522 F.3d 508, 513 n.17 (5th Cir. 2008); *Brammer-Hoelter v. Twin Peaks Charter Acad.*, 492 F.3d 1192, 1202-03 (10th Cir. 2007); *Wilburn v. Robinson*, 480 F.3d 1140, 1149 (D.C. Cir. 2007). The Third, Seventh, Eighth, and Ninth Circuits, on the other hand, have reached a contrary result, holding that "whether a particular incident of speech is made within a particular plaintiff's job duties is a mixed question of fact and law" to be resolved by the trier of fact. *Reilly*, 532 F.3d at 227; *see also Davis v. Cook Cnty.*, 534 F.3d 650, 653 (7th Cir. 2008); *Casey v. Cabool*, 12 F.3d 799, 803 (8th Cir. 1993) ("[A]ny underlying factual disputes concerning whether the speech at issue [is] protected should [be] submitted to the jury."); *Clairmont*, 632 F.3d at 1105. Because this case was decided on summary judgment, it provides an appropriate vehicle for illuminating this conflict as well.

The Ninth Circuit's rule favors public employers slightly more; it permits an inquiry into whether the petitioner's job duties include sworn testimony. But that court would have ruled in petitioner's favor because here, as in *Clairmont*, there was "no evidence that testifying in court . . . was a part of [petitioner's] official duties." 632 F.3d at 1106. Petitioner was a civil servant directing a program for at-risk youth. He was not a law enforcement official, nor was he the sort of employee who would regularly appear in court for any reason. All he did was cooperate with a subpoena, issued by a federal court, to appear and testify truthfully. That subpoena was issued to him in his individual capacity, and the consequences for defying the subpoena were his alone to bear. Under the Ninth Circuit's rule, petitioner's speech would have been protected.

The Eleventh Circuit reached a contrary result in this case by emphasizing that "the subject matter of [petitioner's] testimony touched only on acts he performed as part of his official duties," Pet. App. 7a. But the Third, Seventh, and Ninth Circuits have all held that same fact to be essentially irrelevant. *See Karl*, 678 F.3d at 1074 ("[A] public employee's speech on a matter of public concern is protected if the speech is not made pursuant to her official job duties, even if the testimony itself addresses matters of employment."); *Reilly*, 532 F.3d at 231 ("[T]he speech at issue on this appeal, Reilly's trial testimony, appears to have stemmed from his official duties in the investigation," but "the act of offering truthful testimony is the responsibility of every citizen, and the First Amendment protection associated with fulfilling

that duty of citizenship is not vitiated by one's status as a public employee."); *Morales*, 494 F.3d at 598 ("Morales testified about speech he made pursuant to his official duties and we must determine whether that fact renders his deposition unprotected. We hold that it does not.").

Moreover, the Third, Seventh, and Ninth Circuits would each have held that Franks was not entitled to qualified immunity. As the various courts of appeals explained, this Court's public employee speech cases and its cases regarding the importance of sworn testimony all indicate that sworn testimony by public employees merits First Amendment protection. *See Clairmont*, 632 F.3d at 1109; *Morales*, 494 F.3d at 605-06 (Rovner, J., concurring); *Reilly*, 532 F.3d at 232; This Court's precedents have been on the books for years, and certainly long before 2009, when petitioner was terminated.

II. The Eleventh Circuit's Holding Conflicts With This Court's Precedents.

Certiorari also is warranted because the Eleventh Circuit's holding is contrary to this Court's precedents regarding both public employee speech and the role of sworn testimony.

"[A] citizen who works for the government is nonetheless a citizen." *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006). Because "the threat of dismissal from public employment is . . . a potent means of inhibiting speech," *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 574 (1968), "[t]he First Amendment limits the ability of a public employer to

leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens," *Garcetti*, 547 U.S. at 417. Those liberties necessarily include the right to participate in public affairs, and to comment on matters of public concern. *See Connick v. Myers*, 461 U.S. 138, 145 (1983); *Pickering*, 391 U.S. at 573-74.

This Court has held that the employee's First Amendment interests must give way to an employer's prerogatives in two circumstances. First, some speech is altogether unprotected. "When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." *Connick*, 461 U.S. at 146. Thus, for example, "an employee grievance concerning internal office policy" does not receive First Amendment protection. *Id.* at 154. Similarly, "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Garcetti*, 547 U.S. at 421.

Second, if the speech is protected, "[t]he question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public." *Id.* at 418. In such cases, the court must find "a balance between the interests of the [employee], as

a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568. Thus, any restriction on protected employee speech "must be directed at speech that has some potential to affect the entity's operations." *Garcetti*, 547 U.S. at 418.

In *Garcetti v. Ceballos*, this Court synthesized these principles to hold that "[s]o long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively." *Id.* at 419. Because the parties in *Garcetti* agreed that the employee's speech was made in the course of his duties, the Court held it unprotected, and declined to establish "a comprehensive framework for defining the scope of an employee's duties in cases where there is room for serious debate." *Id.* at 424. However, the Court did specify that "[t]he proper inquiry is a practical one," and that courts should take care to ensure that employers do not "restrict employees' rights by creating excessively broad job descriptions" in an effort to disable First Amendment protection for employee speech. *Id.*

When a public employee speaks on a matter of public concern, the First Amendment protects that speech not only to vindicate the rights of the employee himself, but also to safeguard "the public's interest in receiving the well-informed views of government employees engaging in civic discussion." *Id.* After all,

public employees are "the members of a community most likely to have informed and definite opinions" about topics that relate to their employment, such that repressing their views would impoverish public debate, imposing "widespread costs" on society in general. *Id.* (quotation marks and citation omitted).

Society has a strong interest in facilitating sworn testimony in public corruption investigations, lest the corruption continue unchecked. Public employees have vital information relating to fraud, waste, and abuse in the government. If the First Amendment fails to protect them when they speak out, there is a substantial risk that they will be deterred from coming forward in the first instance, especially in cases like this one involving powerful public figures who express their willingness to retaliate against whistleblowers. *See* Pet. App. 2a, 11a.[3]

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[3] As this case illustrates, the existing patchwork of whistleblower protections cannot vindicate society's interest in combating corruption. Count I of petitioner's amended complaint sought relief under the Alabama State Employees Protection Act, which protects public employees from retaliation if the employee "reports, under oath or in the form of an affidavit, a violation of a law, a regulation, or a rule, promulgated pursuant to the laws of this state, or a political subdivision of this state, to a public body." Ala. Code § 36-26A-3. The district court denied that claim for two reasons. First, the statute expressly exempts "[a]ll officers and employees of the state's institutions of higher learning" from the scope of its coverage, so petitioner cannot state a claim under it. Ala. Code § 36-26-10(b)(5). Second, federal courts enforcing federal laws do not qualify as "public bodies" under the statute, so petitioner's grand jury testimony is categorically not protected by

The societal interest in public employee speech is at its zenith in cases involving subpoenaed testimony. A citizen's "duty to testify has been regarded as 'so necessary to the administration of justice' that the witness' personal interest in privacy must yield to the public's overriding interest in full disclosure." *United States v. Calandra*, 414 U.S. 338, 345 (1974) (quoting *Blair v. United States*, 250 U.S. 273, 281 (1919)). Thus, "'public policy . . . requires that the paths which lead to the ascertainment of truth should be left as free and unobstructed as possible.'" *Briscoe v. LaHue*, 460 U.S. 325, 333 (1983) (quoting *Calkins v. Sumner*, 13 Wis. 193, 197 (1860)); *see also United States v. Havens*, 446 U.S. 620, 626 (1980) ("There is no gainsaying that arriving at the truth is a fundamental goal of our legal system."). The obligation to respond to a subpoena overrides not only an individual's interest in privacy, but also a journalist's interest in protecting his sources, *Branzburg v. Hayes*, 408 U.S. 665, 690-91 (1972), and even a President's executive prerogative, *see United States v. Nixon*, 418 U.S. 683, 709 (1974). Just recently, this Court recognized the importance of such testimony when it held that grand

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the statute. The Alabama statute is not unique—indeed, it is not even unusual. State whistleblower statutes often include idiosyncratic limitations or exhaustion requirements that render them inapplicable in crucial cases. *See, e.g.*, Public Employees for Environmental Responsibility, State Whistleblower Laws – Overview, http://www.peer.org/assets/docs/wbp2/overview.pdf (last visited Oct. 15, 2013) (comparing and contrasting features of state whistleblower laws).

jury witnesses are absolutely immune from suits arising from their testimony. *See Rehberg v. Paulk*, 132 S. Ct. 1497, 1506 (2012).

Importantly, the obligation to respond truthfully to a subpoena is "shared by *all citizens*," and not incidental to public employment. *See Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991) (emphasis added) (citing *Branzburg*, 408 U.S. at 669); *see also Calandra*, 414 U.S. at 345 ("The duty to testify has long been recognized as a basic obligation that every citizen owes his Government."); *Piemonte v. United States*, 367 U.S. 556, 559 n.2 (1961) ("Every citizen of course owes to his society the duty of giving testimony to aid in the enforcement of the law."); *United States v. N.Y. Tel. Co.*, 434 U.S. 159, 175 n.24 (1977). No citizen—whether employed by a government or not—may refuse to comply with a subpoena without risking contempt. And public employment will not shield a citizen from the obligation to testify truthfully. A testifying public employee—like any other citizen—is individually compelled to give his evidence. He is not summoned in his official capacity, and the penalty if he does not comply does not run to his office, but instead affects him directly and personally. He alone bears the risk of perjury and contempt, and therefore it is his own interest and society's interest in the truth, and not the interests of his employer, that are at stake when he testifies.

Consequently, when a public employee responds to a subpoena, the most natural conclusion is that he is speaking "as a citizen addressing matters of public concern." *Garcetti*, 547 U.S. at 417. Indeed, in

Garcetti, Justice Souter highlighted—without any disagreement from the majority—the unique importance of sworn testimony, arguing that on remand, the plaintiff's "claim relating to truthful testimony in court must surely be analyzed independently to protect the integrity of the judicial process." *Id.* at 444 (Souter, J., dissenting).

Of course, it may be possible to imagine cases in which a public employee's duties include such testimony—and in such cases, the most natural conclusion may not be correct—but this is not such a case. Petitioner's job was to direct the CITY program: to manage its budget and staff, and to ensure that it provided a safe, productive environment for young people who needed help getting back on track. Nowhere—in his official job responsibilities, or anywhere else—was there any obligation to testify in the federal criminal trial of a corrupt legislator.

In reaching a contrary result, the Eleventh Circuit erred twice. First, without acknowledging the import of this Court's decision in *Garcetti*, or any of this Court's settled precedents relating to the societal interest in subpoenaed testimony, the court of appeals applied its prior precedent to hold that truthful testimony "given merely 'in compliance with a subpoena to testify truthfully'—and not as a 'public comment on . . . office policies and procedures, the internal workings of the department, the quality of its employees or upon any issue at all'— . . . was unprotected under the First Amendment." Pet. App. 6a-7a (quoting *Morris v. Crow*, 142 F.3d 1379, 1382-83 (11th Cir. 1998)).

This reasoning is wrong because it enacts a crabbed interpretation of the concept of "speech on a matter of public concern." Under the Eleventh Circuit's interpretation, speech apparently only relates to a matter of public concern if the speaker subjectively intends to make a personal political statement about his employer. But this Court's precedents are not so narrow. In *Snyder v. Phelps*, 131 S. Ct. 1207, 1216 (2011), for example, this Court explained that "[s]peech deals with matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest: that is, a subject of general interest and of value and concern to the public" (internal quotation marks and citations omitted). This Court's precedents also call for courts to evaluate the "content, form, and context" of the speech, "as revealed by the whole record." *Connick*, 461 U.S. at 147-48.

The Eleventh Circuit spurned this inquiry, affording no weight to the "context" of petitioner's statements: subpoenaed testimony in the federal corruption trial of an elected official. As the cases relating to subpoenas, *supra*, establish, the context of subpoenaed testimony should be dispositive, because messages delivered by a subpoenaed witness to a federal court relate *ipso facto* to matters of public concern, *i.e.*, to society's interest in knowing the truth and upholding the law.

Here, however, that general interest in justice is only the tip of the iceberg, because the content of petitioner's testimony was itself plainly a matter of

public concern. Schmitz's federal criminal case, as explained by panel that upheld her conviction, involved "a calculated and extensive pattern of fraudulent conduct designed to allow her to collect a state-government salary while performing almost no work. . . . And, when people started asking questions, she used her status as state legislator to keep the scheme going." *United States v. Schmitz*, 634 F.3d 1247, 1265 (11th Cir. 2011). The outcome of the case resulted in the removal of an elected official from office. And regular developments in the case repeatedly made headlines. *See, e.g.*, Virginia Martin, *CITY Coordinator Testifies About Schmitz's Work*, The Birmingham News, Feb. 17, 2009; *Schmitz Fraud Trial Begins Today*, The Birmingham News, Aug. 18, 2008; *Schmitz's Case Grows into War of Words*, The Birmingham News, May 7, 2008. It is difficult to imagine a better paragon of a "matter of public concern."

The Eleventh Circuit erred a second time when it emphasized that "the subject matter of [petitioner's] testimony touched only acts that he performed as part of his official duties" to support its conclusion that the testimony itself was pursuant to those duties. Pet. App. 7a. That holding flies in the face of this Court's admonition in *Garcetti* and in *Pickering* that public employees—by virtue of their expertise and experience—may possess knowledge that is uniquely valuable. It makes no sense to hold, as the Eleventh Circuit did, that speech offered in a public forum far removed from petitioner's place of employment, for a purpose unrelated to that employment, is unprotected

merely because it related to facts that he learned while on the job. This Court's cases stand for exactly the opposite proposition: that the public has a strong interest in hearing from public employees on matters of public concern that implicates those employees' specialized knowledge. This case bears that out: the people best situated to testify regarding Schmitz's corruption were employees of the CITY program, who witnessed firsthand her failure to perform; and of those employees, petitioner was the best situated of all.

The Eleventh Circuit's analysis is not merely wrong in light of this Court's precedents, but obviously so. As the decisions of the Third, Seventh, and Ninth Circuits establish, a close reading of this Court's cases forecloses the flippant treatment that the Eleventh Circuit here afforded to petitioner's testimony. Although the Eleventh Circuit applied its precedent, both that holding and the court's conclusion regarding qualified immunity should be reversed. Any other result would sanction retaliation against a citizen who did nothing more than his duty—as a citizen—to tell the truth in support of a federal criminal investigation.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 15, 2013

APPENDIX

APPENDIX A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 12-16192

Non-Argument Calendar

Docket No. 4:11-cv-00883-KOB

EDWARD R. LANE,

Plaintiff-Appellant,

versus

CENTRAL ALABAMA COMMUNITY COLLEGE, STEVE FRANKS, Dr.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Alabama

(July 24, 2013)

Before MARTIN, FAY, and EDMONDSON, Circuit Judges.

PER CURIAM:

Edward Lane appeals the district court's grant of summary judgment in favor of Steve Franks, the president of Central Alabama Community College ("CACC"), in his 42 U.S.C. § 1983 lawsuit alleging retaliation in violation of the First Amendment. No reversible error has been shown; we affirm.

In September 2006, Lane accepted a probationary position as Director of CACC's Community Intensive Training for Youth Program ("CITY"), a program for at-risk youth. Soon after assuming his duties, Lane audited CITY's finances and discovered that then-state representative Suzanne Schmitz was listed on CITY's payroll but was not reporting for work and had not otherwise performed tangible work for the program.

When Lane raised his concerns about Schmitz internally, he was warned by CACC's then-president and by CACC's lawyer that terminating Schmitz's employment could have negative repercussions for both Lane and CACC. Despite these warnings, Lane terminated Schmitz's employment with CITY after Schmitz refused to report to work.

Schmitz filed a lawsuit seeking to get her job back. Schmitz also commented to another CITY employee that she planned to "get [Lane] back" for terminating her and that, if Lane requested money from the state legislature, she would tell him "you're fired."

Soon after Schmitz's job termination, the FBI began investigating Schmitz and contacted Lane for information. Lane testified before a federal grand jury and -- pursuant to a subpoena -- testified at Schmitz's

August 2008 federal criminal trial for mail fraud and fraud involving a program receiving federal funds.

Lane testified that Schmitz had not reported to work and had not submitted time sheets. Lane described a couple of telephone conversations he had with Schmitz during which Lane asked about Schmitz's work responsibilities and explained that he needed to account for her day-to-day activities for CITY. Lane instructed Schmitz – verbally and in writing – to start reporting daily to CITY's Huntsville office. Over the phone, Schmitz responded by telling Lane that she had gotten her job through her connections with the Executive Secretary of the Alabama Education Association. Schmitz later sent a letter in which she refused to report to the Huntsville office and requested that she be allowed to "continue to serve the CITY Program in the same manner as [she had] in the past." Lane testified the he had expressed his concerns about Schmitz's position with CACC's interim president, who agreed that Lane needed to get Schmitz to report to work. Lane testified to these facts again at Schmitz's second criminal trial in February 2009.

In late 2008 – due to substantial budget cuts – Lane and Franks began discussing the possibility of employee layoffs, including laying off all probationary employees. In January 2009, Franks sent termination letters to 29 CITY employees with less than 3 years of service, which included Lane. A few days later, however, Franks rescinded nearly all of those terminations: Lane was one of only two employees whose termination was not rescinded. According to

Franks, he rescinded the other terminations after discovering that many of the CITY employees were not in fact probationary.

Lane filed a civil action against Franks -- in both his official and individual capacity -- alleging that Franks terminated Lane in retaliation for testifying against Schmitz, in violation of the First Amendment.[1] The district court granted Franks's motion for summary judgment. Although the district court couched its decision in terms of qualified immunity, it determined that Lane's speech was made pursuant to his official duties as CITY's Director, not as a citizen on a matter of public concern. We reach the same conclusion. Because Lane has failed to establish a *prima facie* case of retaliation, we do not decide about Franks's defense of sovereign immunity.[2]

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[1] On appeal, Lane has abandoned expressly (1) his claims against CACC; (2) his claims for violation of the Alabama State Employee Protection Act, Ala. Code § 36-26A-3; (3) his claims for violation of 42 U.S.C. § 1985; and (4) his claim for money damages against Franks in his official capacity.

[2] Having concluded that Lane failed to establish even a prima facie case for a violation of a federal right, we necessarily also conclude that Lane failed to demonstrate that Franks violated a federal right of Lane's that was already clearly established before Franks acted. Thus, even if -- if, which we think is not correct -- a constitutional violation of Lane's First Amendment rights occurred in these circumstances, Franks would be entitled to qualified immunity in his personal capacity. *See Vinyard v. Wilson*, 311 F.3d 1340, 1346 (11th Cir. 2002) (government officials acting within the scope of their discretionary authority are immune from individual civil liability

We review a district court's grant of summary judgment de novo, and we view the evidence and all reasonable factual inferences in the light most favorable to the nonmoving party. *Skop v. City of Atlanta*, 485 F.3d 1130, 1136 (11th Cir. 2007). "Summary judgment is appropriate if the evidence establishes 'no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'" *McCormick v. City of Fort Lauderdale*, 333 F.3d 1234, 1243 (11th Cir. 2003).

To establish a claim of retaliation for protected speech under the First Amendment, a public employee must show, among other things, that he "spoke as a citizen on a matter of public concern." *See Garcetti v. Ceballos*, 126 S. Ct. 1951, 1958 (2006) (a decision further restricting public employees' protected speech). A government employee whose speech is made pursuant to his official duties is not speaking as a citizen. *See id.* at 1960; *Battle v. Bd. of Regents*, 468 F.3d 755, 760 (11th Cir. 2006). Even if an employee was not required to make the speech as part of his official duties, he enjoys no First Amendment protection if his speech "owes its existence to [the] employee's professional responsibilities" and is "a product that 'the employer itself has commissioned or created'". *See Abdur-Rahman v. Walker*, 567 F.3d 1278, 1286 (11th Cir. 2009).

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if the official's conduct violates no "clearly established statutory or constitutional rights of which a reasonable person would have known.").

Whether the subject speech was made by the public employee speaking as a citizen or as part of the employee's job responsibilities is a question of law for the court to decide. *See Vila v. Padron*, 484 F.3d 1334, 1339 (11th Cir. 2007). In determining whether a government employee's statement is protected by the First Amendment, "we look to the content, form, and context of a given statement, as revealed by the whole record." *Abdur-Rahman*, 567 F.3d at 1283.

In *Morris v. Crow*, we determined that a police officer's speech -- which consisted of the officer's accident report and his subpoenaed deposition testimony made in conjunction with judicial proceedings, "reiterat[ing]" the observations made in his accident report -- was unentitled to First Amendment protection. 142 F.3d 1379 (11th Cir. 1998). Because the officer prepared his accident report in the normal course of his official duties, the report did not constitute speech "made primarily in the employee's role as citizen." *Id.* at 1382. And because the officer's deposition testimony was given merely "in compliance with a subpoena to testify truthfully" -- and not as a "public comment on sheriff's office policies and procedures, the internal workings of the department, the quality of its employees or upon any issue at all" -- it was unprotected under the First Amendment. *Id.* at 1382-83 ("The mere fact that Morris's statements were made in the context of a civil

deposition cannot transform them into constitutionally protected speech."). [3]

No one disputes that Lane was acting pursuant to his official duties as CITY's Director when he investigated Schmitz's work activities, spoke with Schmitz and other CACC officials about Schmitz's employment, and ultimately terminated Schmitz's employment. That Lane testified about his official activities pursuant to a subpoena and in the litigation context, in and of itself, does not bring Lane's speech within the protection of the First Amendment. *See id.* Furthermore, because formal job descriptions do not control, that Lane's official duties did not distinctly require him to testify at criminal trials falls short of triggering First Amendment protection. *See Abdur-Rahman*, 567 F.3d at 1283.

Although not dispositive, we consider it pertinent that the subject matter of Lane's testimony touched only on acts he performed as part of his official duties.

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[3] Other circuits seem to have decided this issue differently. *See Morales v. Jones*, 494 F.3d 590, 598 (7th Cir. 2007) (concluding that a public employee's subpoenaed deposition testimony about speech he made pursuant to his official duties was protected by the First Amendment); *Reilly v. City of Atlantic City*, 532 F.3d 216 (3d Cir. 2008) (explaining that a police officer's trial testimony was protected by the First Amendment because, although the testimony stemmed from the officer's official duties, the officer had an "independent obligation as a citizen to testify truthfully."). But *Morris* is the law in this Circuit on the question of public employee speech per a subpoena in the context of judicial proceedings.

See Abdur-Rahman, 567 F.3d at 1282. As in *Morris*, nothing evidences that Lane testified at Schmitz's trial "primarily in [his] role as a citizen" or that his testimony was an attempt to comment publicly on CITY's internal operations.

In the light of our precedents, the record fails to establish that Lane testified as a citizen on a matter of public concern: as a matter of law, he cannot state a claim for retaliation under the First Amendment. Franks was entitled to summary judgment.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION

Edward R. Lane,	)	
	)	
Plaintiff,	)	
vs.	)	CV-11-BE-0883-M
	)	
Central Alabama Community College, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

This matter comes before the court on Defendants Central Alabama Community College and Dr. Franks' "Motion for Summary Judgment." (Doc. 34). Plaintiff Mr. Lane brought state and federal retaliation claims against CACC, Dr. Franks in his official capacity, and Dr. Franks in his individual capacity for allegedly terminating him in retaliation for testimony he gave at a criminal trial.

The court finds that the Eleventh Amendment and the doctrine of qualified immunity bar Mr. Lane's

claims against CACC, an arm of the state of Alabama, his claims against Dr. Franks, in his official capacity as President of CACC, and his claims against Dr. Franks in his individual capacity as discussed below. Thus, the court will grant the Defendants' Motion for Summary Judgment as to all claims.

I. STATEMENT OF FACTS

A. Factual History

Mr. Lane's Employment Status at C.I.T.Y.

On September 26, 2006, Defendant Central Alabama Community College ("CACC") hired Plaintiff Edward Lane as the probationary Director, the highest ranking position, of the Community Intensive Training for Youth (C.I.T.Y.) Program at CACC. C.I.T.Y. is a statewide program for underprivileged youth with multiple offices throughout Alabama. In his job as Director, Mr. Lane ran the program, including day-to-day operations, hiring and firing of employees, and making financial decisions.

Mr. Lane's original hire letter in 2006 was from CACC's then-President, Linda McGuirt, and Ms. McGuirt informed Mr. Lane that she was his supervisor. In the summer of 2007, however, Chancellor Byrne determined that Mr. Lane was actually an employee of the Board of Directors of C.I.T.Y., not an employee of Central Alabama Community College and sent C.I.T.Y.'s business manager a letter to that effect. In August 2007, the President of the C.I.T.Y. Board of Directors, Helen McAlpine, sent Mr. Lane a letter offering him a probationary appointment as Director of the C.I.T.Y.

program beginning August 1, 2007; Mr. Lane accepted the appointment from the Board of Directors.

C.I.T.Y.'s Financial Problems during Mr. Lane's Employment

As soon as he took his position at C.I.T.Y., Mr. Lane began an audit to evaluate the program's financial position because C.I.T.Y. was experiencing significant financial problems. During this audit, Mr. Lane discovered that then-state representative Suzanne Schmitz was listed on C.I.T.Y.'s payroll but did not appear to be coming to work or producing any tangible work product. John Caylor, CACC's attorney, warned Mr. Lane that taking actions against Ms. Schmitz could have bad repercussions for both Mr. Lane and CACC. On October 19, 2006, Mr. Lane terminated Ms. Schmitz from her employment at C.I.T.Y. After her termination, Ms. Schmitz commenced a civil lawsuit to get her job back at C.I.T.Y., and she made comments to Charles Foley, then-Madison County C.I.T.Y. program coordinator, that she planned to "get [Mr. Lane] back" for her termination. (Doc. 38, at 10). Ms. Schmitz also said that if Mr. Lane was to request money for C.I.T.Y. from the state legislature, she would tell him, "You're fired." *Id.*

When Mr. Lane was hired in 2006 by the then-President of CACC, Ms. McGuirt, C.I.T.Y's Mobile and Montgomery programs were slated to close because of loss of grant money. Mr. Lane decided to keep these programs and started a new program in Lauderdale County. Mr. Lane did not instruct anyone at C.I.T.Y to actively look for grant opportunities or write grant

applications; he also was not looking or applying for grants himself. The two-year college system had a department that received federal grants, and C.I.T.Y. requested some of these grants under Mr. Lane's direction.

Mr. Lane claims that he was able to keep all of the programs running because he successfully controlled expenditures at C.I.T.Y. CACC disputes the alleged "controlled expenditures" and claims that Mr. Lane was only able to keep all of the programs running because of a one-time legislative appropriation and a one-time private donation. CACC further claims that Mr. Lane did not try to do anything to gain funding for the program except submit a budget to the legislature every year. The Alabama legislature only appropriated sufficient funding to C.I.T.Y for one year under Mr. Lane's leadership, and then it cut C.I.T.Y's funding dramatically. In 2008, C.I.T.Y.'s budget was cut by $1.75 million, approximately one-fourth of its budget.

Mr. Lane's Testimony in Suzanne Schmitz's Criminal Case

After Mr. Lane terminated Ms. Schmitz, the FBI began investigating Ms. Schmitz and C.I.T.Y. On November 13, 2006, Mr. Lane testified before a grand jury that Ms. Schmitz was fired because she did not "show up for her job." Mr. Lane claims that he also testified as to how Ms. Schmitz got her job at C.I.T.Y., but no evidence exists to support that contention.

On August 26, 2008, pursuant to a subpoena, Mr. Lane testified at Ms. Schmitz's federal criminal trial for mail fraud and fraud involving a program receiving federal funds. Mr. Lane testified that he fired Ms.

Schmitz because of her failure to come to work or do her job at C.I.T.Y. Mr. Lane also testified that Ms. Schmitz got her job at C.I.T.Y. through Dr. Paul Hubbert, Executive Secretary of the Alabama Education Association, and that people within the C.I.T.Y. program were afraid to question Ms. Schmitz's employment because they were afraid of losing funding from the legislature. Also at the criminal trial, Larry Palmer, C.I.T.Y.'s Regional Coordinator, testified that C.I.T.Y. hired Ms. Schmitz because of the influence of Roy Johnson, the previous Chancellor of CACC, and Dr. Hubbert. Mr. Lane also testified that when he pressed Ms. Schmitz about her failure to perform her job at C.I.T.Y., she responded that she "needed to call Mr. Hubbert." Mr. Lane testified to the same facts again in Ms. Schmitz's second criminal trial on February 18, 2009.

Mr. Lane's Termination from C.I.T.Y.

In January 2008, Defendant Dr. Steve Franks assumed the position of President of CACC under then-Chancellor of Alabama's two-year college system, Bradley Byrne. Even before Mr. Lane began reporting to Dr. Franks, Mr. Lane was considering a Reduction in Force ("RIF") at C.I.T.Y. On November 20, 2008, Mr. Lane began reporting to Dr. Franks, but had only very little contact with Dr. Franks during his employment with C.I.T.Y.

Mr. Lane communicated C.I.T.Y.'s budget problems to Dr. Franks in November 2008, including his recommendation for a RIF. Mr. Lane and Dr. Franks continued their talks about a RIF throughout the end of 2008 and by the end of 2008, C.I.T.Y. was in

danger of not making its payroll on time every month, if at all. Dr. Franks agreed with Mr. Lane's RIF recommendation, and Dr. Franks initially responded that all probationary employees should be terminated.

On November 20, 2008, Chancellor Byrne dissolved the C.I.T.Y. Board of Directors and communicated that in accordance with the administrative law ruling in *Robinson, Schmidt, & Settle v. City Skills Training Consortium & Central Ala. Comm. College*, No. OAH-06-388, all C.I.T.Y. employees were to be considered employees of CACC.

The Defendants claim that on January 9, 2009, Dr. Franks made the financial decision to terminate Mr. Lane and other probationary employees associated with the C.I.T.Y. program. Dr. Franks did not give Mr. Lane any reason for his termination, but Dr. Franks testified that "Lane was terminated due to financial difficulties facing the C.I.T.Y. program." (Doc. 38, at 18). Dr. Franks consulted with Chancellor Byrne before terminating Mr. Lane. Mr. Lane disputes that Dr. Franks made this decision based on financial reasons and believes that Dr. Franks was actually retaliating against Mr. Lane for testifying in Ms. Schmitz's trial.

The Defendants allege that no one, including Ms. Schmitz, instructed Dr. Franks to fire Mr. Lane or suggested to Dr. Franks that he should fire Mr. Lane. Mr. Lane disputes this fact, claiming that a jury could "easily infer" that Dr. Hubbert instructed or suggested Dr. Franks should terminate Mr. Lane. (Doc. 38, at 5). Mr. Lane also claims that Dr. Franks often had discussion with Dr. Hubbert about the C.I.T.Y.

program during the 2009 legislative session, but Dr. Franks specifically testified that he did not consult Dr. Hubbert about his decision to terminate Mr. Lane.

Mr. Lane offered no evidence that Dr. Franks had an agreement with Ms. Schmitz or Betty Carol Graham, another state representative, to fire Mr. Lane as a result of his testimony against Ms. Schmitz. Dr. Franks testified that he never discussed Mr. Lane with either Mrs. Schmitz or Mrs. Graham prior to Mr. Lane's termination. Similarly, Ms. Schmitz testified that she never talked to Dr. Franks or anyone else within the two-year system who was in a position to do anything about Mr. Lane's employment after Mr. Lane had testified against her. In fact, Dr. Franks testified that he only met Ms. Schmitz once briefly at a legislative session, and Ms. Schmitz testified that she did not remember ever meeting Dr. Franks or having any dealings with him.

Dr. Frank's appointment of Larry Palmer as Interim Director

At the time of Mr. Lane's termination, Dr. Franks named Larry Palmer, then-regional coordinator, as interim director of C.I.T.Y. Mr. Palmer had been a C.I.T.Y. employee since the 1990s and had served as interim director once before. When he assumed the role of interim director, Mr. Palmer continued his role as regional coordinator as well and served in both capacities. Upon his appointment, Mr. Palmer received a raise because of his added responsibilities and was making the same salary Mr. Lane had made before he was terminated. CACC was able to save costs because Mr. Palmer was performing two jobs for one salary.

Mr. Palmer remained interim director until September 2009 when the C.I.T.Y. program ceased to exist, and Mr. Palmer was terminated along with all C.I.T.Y. employees.

Dr. Frank's recision of some C.I.T.Y. Employees' Termination

Sometime shortly after Dr. Franks terminated the C.I.T.Y. employees (a dispute exists as to when), Dr. Franks decided to rescind the termination of some of the Lauderdale and Franklin County employees he fired on January 9, 2009. The Defendants claim that Dr. Franks made this decision on January 23, 2009, and Mr. Lane claims that Dr. Franks sent out the recision letters on January 29, 2009. Regardless, the decision was made before Mr. Lane testified at Ms. Schmitz's second trial on February 19, 2009.

Dr. Franks testified that he rescinded some of the terminations because he learned that these employees were not probationary employees. At the time the employees who had been terminated were hired, a six month probationary period existed for C.I.T.Y. employees. Thus, even though the employees were later deemed CACC employees, at the time of their employment for Fair Dismissal Act purposes, they were employed under C.I.T.Y.'s six-month probationary period, as opposed to CACC's three-year probationary period and were not considered probationary employees when Dr. Franks fired them.

Mr. Lane was one of two employees whose termination was not rescinded. A dispute exists as to why Dr. Franks did not rescind Mr. Lane's termination. Dr. Franks testified that he believed Mr.

Lane was a probationary employee because he was hired by CACC as evidenced by his initial hire letter, and the CACC probationary period was three years. The Defendants claim that Dr. Franks thought Mr. Lane was in a fundamentally different category than the other employees because he was the director of the entire C.I.T.Y. program and not simply an employee. When asked why he considered Mr. Lane different than the other C.I.T.Y. employees whose termination he rescinded, Dr. Franks responded: "because he was the only employee that had an appointment letter from the president of [CACC]." (Doc. 38, at 19).

Mr. Lane alleges that Dr. Franks did not rescind his termination because Dr. Franks possessed a "retaliatory motivation." (Doc. 38, at 3). Mr. Lane claims that the timing of his termination is very suspicious; it was "right around the time that the budget process was beginning in the legislature." (Doc. 38, at 20). Dr. Franks knew that Mr. Lane had testified at Ms. Schmitz's first criminal trial, but Mr. Lane never discussed the contents of his testimony with Dr. Franks. Mr. Lane also testified that he believed "the totality of the situation" and "Dr. Franks' actions" led him to believe he was being retaliated against for his testimony. (Doc. 38, at 21).

The Defendants claim that Mr. Lane had no reason to believe that Dr. Franks was out to get him or that Dr. Franks' stated reasons for termination and not rescinding that termination were untruthful or pretextual. The Defendants also claim that Dr. Franks did not even remember that Mr. Lane had previously testified in Ms. Schmitz's criminal case and that he did

not know Mr. Lane was planning on testifying in her second criminal trial.

The parties do not dispute that Dr. Franks was not aware of any statements by Ms. Schmitz that she would see to it that Mr. Lane would lose his job after he testified against her. The parties do not dispute that Mr. Lane did not discuss with anyone at the College Department of Post Secondary Education, including Dr. Franks, that he was going to testify at Ms. Schmitz's second criminal trial before he did in fact testify. Dr. Franks had already terminated Mr. Lane when Mr. Lane received notice that he would be testifying at the second trial, and Dr. Franks did not know about the second trial until after it occurred. Dr. Franks never told Mr. Lane not to testify, and neither Dr. Franks nor CACC ever attempted to prevent Mr. Lane from testifying before the grand jury or at either trial.

B. Procedural History

This case was originally filed in the Middle District of Alabama on January 3, 2011. Mr. Lane's Complaint alleged three counts: (I) violation of the State Employee Protection Act under Ala. Code 36-26A-3; (II) retaliation for the exercise of protected First Amendment speech; and (III) a violation of 42 U.S.C. 1985, conspiring to injure witnesses for testifying. (Doc. 2-1). It was transferred to this court on March 4, 2011. On March 11, 2011, CACC filed a Motion to Dismiss for failure to state a claim. (Doc. 4). This court denied the Motion to Dismiss as to Counts I and II and granted it as to Count III. (Doc. 9).

On May 24, 2011, Mr. Lane filed an Amended Complaint alleging the same counts as his original complaint. (Doc. 11). On June 3, 2011, the Defendants filed a Motion to Dismiss Count III, the conspiracy charge, of the Amended Complaint. (Doc. 12). The court construed Mr. Lane's response to Defendants' Motion to Dismiss as a voluntary dismissal of Count III and thus dismissed Count III without prejudice. (Doc. 15). As Mr. Lane's Amended Complaint stands now, Count I seeks relief from Dr. Franks for violation of the State Employee Protection Act and Count II seeks relief from Dr. Franks and CACC for termination in retaliation for speech protected by the First Amendment. On April 30, 2012, after discovery by both parties, CACC filed this Motion for Summary Judgment. (Doc. 34).

II. STANDARD OF REVIEW

Summary judgment allows a trial court to decide cases when no genuine issues of material fact are present and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56. When a district court reviews a motion for summary judgment, it must determine two things: (1) whether any genuine issues of material fact exist; and if not, (2) whether the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

The moving party "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a

genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (quoting Fed. R. Civ. P. 56). The moving party can meet this burden by offering evidence showing no dispute of material fact or by showing that the non-moving party's evidence fails to prove an essential element of its case on which it bears the ultimate burden of proof. *Celotex*, 477 U.S. at 322-23. Rule 56, however, does not require "that the moving party support its motion with affidavits or other similar materials negating the opponent's claim." *Id.*

Once the moving party meets its burden of showing the district court that no genuine issues of material fact exist, the burden then shifts to the non-moving party "to demonstrate that there is indeed a material issue of fact that precludes summary judgment." *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991).

In reviewing the evidence submitted, the court must "view the evidence presented through the prism of the substantive evidentiary burden," to determine whether the nonmoving party presented sufficient evidence on which a jury could reasonably find for the nonmoving party. *Anderson*, 477 U.S. at 254; *Cottle v. Storer Commc'n, Inc.*, 849 F.2d 570, 575 (11th Cir. 1988). The court must refrain from weighing the evidence and making credibility determinations, because these decisions fall to the province of the jury. *See Anderson*, 477 U.S. at 255; *Stewart v. Booker T. Washington Ins. Co.*, 232 F.3d 844, 848 (11th Cir. 2000); *Graham v. State Farm Mut. Ins. Co.*, 193 F.3d 1274, 1282 (11th Cir. 1999).

Furthermore, all evidence and reasonable inferences drawn from the underlying facts must be viewed in the light most favorable to the non-moving party. *Graham*, 193 F.3d at 1282.

The nonmoving party "need not be given the benefit of every inference but only of every reasonable inference." *Id*. Additionally, "conclusory assertions. . ., in the absence of supporting evidence, are insufficient to withstand summary judgment." *Holifield v. Reno*, 115 F.3d 1555, 1564 n. 6 (11th Cir. 1997). After both parties have addressed the motion for summary judgment, the court must grant the motion if no genuine issues of material fact exist and if the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56.

III. LEGAL ANALYSIS

Although some genuine issues of material fact exist in this case concerning Dr. Franks' true motivation for terminating Mr. Lane's employment, no genuine issues of material fact exist in the proffered agreed upon statement of facts that bear on the issue of immunity. Because the court finds the Defendants are entitled to judgment as a matter of law and no genuine issues of material fact exist with regard to this dispositive issue, the court will grant summary judgment for the Defendants on this ground.

A. Absolute Immunity

1. Central Alabama Community College

Defendant CACC argues that the Eleventh Amendment to the United States Constitution bars Mr. Lane's claim against CACC for retaliation for

protected speech. The Eleventh Circuit has held that "state universities are 'agencies or instrumentalities' of the state, and thus are immune from suit in federal court." *University of South Alabama v. American Tobacco Co.*, 168 F.3d 405, 412 (11th Cir. 1999) (quoting *Harden v. Adams*, 760 F.2d 1158, 1163-64 (11th Cir. 1985)). Both the Southern District of Alabama and the Middle District of Alabama have specifically ruled that community colleges are entitled to Eleventh Amendment immunity. *See Morris v. Wallace Community College-Selma*, 125 F. Supp. 2d 1315, 1335 (S.D. Ala. 2001) ("Alabama's state law sovereign immunity extends to community colleges. . ." (citing *Williams v. John C. Calhoun Community College*, 646 So. 2d 1, 2 (Ala.1994))); *Wright v. Chattahoochee Valley Community College*, 2008 WL 4877948 (M.D. Ala. 2008) ("State educational institutions, such as [Chattahoochee Valley Community College] are agencies or instrumentalities of the state and thus are immune from suit in federal court." (internal quotations omitted)).

Mr. Lane argues that CACC is not immune from suit for prospective equitable relief, and because Mr. Lane seeks "placement in the position in which he would have worked absent the Defendant's retaliatory treatment," "injunctive relief," and "such other legal or equitable relief," the Eleventh Amendment does not bar Mr. Lane's suit. (Doc. 11). However, the Eleventh Amendment bars monetary and equitable relief against the state and its instrumentalities. *Morris*, 125 F. Supp. 2d, at 1335 (citing *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 120 (1984)). CACC, as a community college, is an arm or

instrumentality of the state and is immune from legal or equitable suit under the Eleventh Amendment. Therefore, the court will GRANT Defendants' Motion for Summary Judgment as to CACC on Count II of the Amended Complaint.

2. Dr. Franks in his Official Capacity

a. Money Damages

The Defendants argue that Dr. Franks acting in his official capacity as president of CACC is not a "person" subject to suit pursuant to 42 U.S.C. § 1983. Mr. Lane argues that Dr. Franks is only immune to the extent that the Eleventh Amendment bars relief for money damages against the State. Because Mr. Lane concedes that he cannot seek money damages against Dr. Franks in his official capacity and because "the Eleventh Amendment bars suits against state officials in federal court seeking compensatory or retroactive relief," the court will dismiss all claims against Dr. Franks that seek money damages. *See Summit Medical Associates, P.C. v. Pryor*, 180 F.3d 1326, 1337 (11th Cir. 1999) (citing *Green v. Mansour*, 474 U.S. 64, 68 (1985)).

b. Equitable Relief

In Count I of his Amended Complaint, the only equitable relief Mr. Lane seeks is "any and all other relief, both at law and in equity" to which he may be entitled. (Doc. 11). In Count II of his Amended Complaint, Mr. Lane seeks "placement in the position in which he would have worked absent the Defendant's retaliatory treatment," "injunctive relief," and "such

other legal or equitable relief" to which he may be entitled. (Doc. 11).

Generally, "state officials sued for damages in their official capacity are immune from suit in federal court" unless the plaintiff is seeking "prospective equitable relief to end continuing violations of federal law" under *Ex parte Young*. *Pears v. Mobile County*, 645 F. Supp. 2d 1062, 1078, n. 22 (S.D. Ala. 2009); Ex parte Young, 209 U.S. 123 (1908). To obtain relief for an ongoing violation of federal law under *Ex parte Young*, the plaintiff must allege that "a violation of federal law by a state official is ongoing as opposed to . . . violated at one time or over a period of time in the past." *Summit Medical Associates*, 180 F.3d at 1338 (citing *Ex parte Young*, 478 U.S. at 277-78).

In *Pears*, the court dismissed the plaintiff's § 1983 claims because," the record [was] devoid of evidence of a continuing violation of federal law by defendants; rather, [plaintiff's] requests for reinstatement and other prospective relief [were] hinged exclusively on discrete acts that occurred in 2006 and early 2007, rather than any ongoing, continuing malfeasance today." *Id.* at n. 22. Like the plaintiff in *Pears*, Mr. Lane requests reinstatement and other generalized equitable relief that is "hinged exclusively" on a "discrete act,"– his termination in 2009. Mr. Lane does not claim that Dr. Franks is engaging in any ongoing violation of federal law that necessitates the prospective injunctive relief contemplated in *Ex parte Young*.

In *Edelman v. Jordan*, the Supreme Court refused to allow retroactive restitution when it would "to a

virtual certainty be paid from state funds, and not from the pockets of individual state officials who were the defendants in the action." 415 U.S. 651, 668 (1974). The Eleventh Circuit has also stated that, "[I]f prospective relief would invade a state's sovereignty as much as an award of money damages would, the action will be barred by the Eleventh Amendment." *Summit Medical Associates*, 180 F.3d at 1337 (citing *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 281 (1997)). The Defendants rightfully point out that Mr. Lane's reinstatement would interfere with CACC, an arm of the State, making employment decisions and would require the State to pay Mr. Lane's salary once he was reinstated. The Eleventh Amendment bars this type of prospective relief that implicates a state's sovereignty interests and funds.

Because Mr. Lane's alleged claims for prospective relief do not fall under the *Ex parte Young* exception to Eleventh Amendment immunity, and the prospective relief Mr. Lane seeks significantly implicates Alabama's sovereignty interests and state treasury, the court will DISMISS all claims against Dr. Franks in his official capacity seeking equitable relief.

3. Dr. Franks in his Individual Capacity

The Defendants argue that Dr. Franks is also immune in his individual capacity because he was acting in his official capacity as President of CACC when he terminated Mr. Lane and state officials are immune in their individual capacities when the state is the real party in interest.

The Defendants rely on *Harbert Intern., Inc. v. James* for the proposition that "[A] suit is against the

sovereign if the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the Government from acting, or to compel it to act." 157 F.3d 1271, 1277 n. 3 (11th Cir. 1998) (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101, 101 n.11 (1984)); *see also Alexander v. Chattahoochee Valley Comm. Coll.*, 325 F. Supp. 2d 1274, 1296 (M.D. Ala. 2004) (dismissing claims against the community college president in her individual capacity because they were barred by the Eleventh Amendment).

Mr. Lane's reinstatement would compel Alabama to act through Dr. Franks and would cost the state an amount of money equal to Mr. Lane's salary. Dr. Franks seems to fit into the framework of a government official who is immune in his individual capacity because the state is the real party in interest in this case. Even if Dr. Franks is not immune under the doctrine of sovereign immunity, however, he is still immune in his individual capacity from suit under the doctrine of qualified immunity.

B. Qualified Immunity

Defendants argue that even if Dr. Franks is not absolutely immune from suit in his individual capacity under the Eleventh Amendment, he is immune under the doctrine of qualified immunity. Qualified immunity protects government officials performing discretionary functions from suit in their individual capacities unless the official violates "clearly established statutory or constitutional rights of which a reasonable person would have known." *Hope v.*

Pelzer, 536 U.S. 730, 739 (2002) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). "The purpose of this immunity is to allow government officials to carry out their discretionary duties without the fear of personal liability or harassing litigation, protecting from suit all but the plainly incompetent or one who is knowingly violating the federal law." *Lee v. Ferraro*, 284 F.3d 1188, 1194 (11th Cir. 2002) (internal quotation marks and citations omitted).

To receive qualified immunity, a government official "must first prove that he was acting within the scope of his discretionary authority when the allegedly wrongful acts occurred." *Vinyard v. Wilson*, 311 F.3d 1340, 1346 (11th Cir. 2002). Government officials act within the scope of their discretionary authority if "the actions were (1) 'undertaken pursuant to the performance of [their] duties' and (2) 'within the scope of [their] authority.'" *Lenz v. Winburn*, 51 F.3d 1540, 1545 (11th Cir. 1995) (quoting *Rich v. Dollar*, 841 F.2d 1558, 1564 (11th Cir. 1998)). "Exercising judgment . . . in the administration of a department or agency of government" is a recognized discretionary function. *Ex parte Cranman*, 792 So. 2d 392, 405 (Ala. 2000).

Mr. Lane concedes that Dr. Franks was acting within the scope of his discretionary authority as President of CACC when he terminated Mr. Lane's employment and subsequently did not rescind the termination. Because the Defendants have established that Dr. Franks was acting within his discretionary authority, the burden now shifts to Mr. Lane to show that qualified immunity is inapplicable in this case. *See Lee v. Ferraro*, 284 F.3d 1188, 1194 (11th Cir.

2002) ("Once the defendant establishes that he was acting within his discretionary authority, the burden shifts to the plaintiff to show that qualified immunity is not appropriate.").

The Supreme Court has articulated a two-part test to determine whether qualified immunity is appropriate. *See Saucier v. Katz*, 533 U.S. 194, 201 (2001). First, the court must ask this threshold question: "Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right[?]" *Gonzalez v. Reno*, 325 F.3d 1228, 1234 (11th Cir. 2003) (citing *Saucier v. Katz*, 533 U.S. 194, 201 (2001)). Second, "[i]f a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right was clearly established." *Id.* (citing *Saucier*, 533 U.S. at 201).

"A constitutional right is clearly established if controlling precedent has recognized the right in a 'concrete and factually defined context.'" *Chesser v. Sparks*, 248 F.3d 1117, 1122 (11th Cir. 2001). "If case law, in factual terms, has not staked out a bright line, qualified immunity almost always protects the defendant." *Post v. City of Fort Lauderdale*, 7 F.3d 1552, 1557 (11th Cir. 1993).

The court recognizes that it is commonly known and well-established that a state cannot "discharge a public employee in retaliation for protected speech." *Tindal v. Montgomery County Comm'n*, 32 F.3d 1535, 1539 (11th Cir. 1994). A public employee's right to speech, however, is not absolute, and the Eleventh Circuit utilizes the *Pickering* balancing test to

determine whether a state actor has retaliated against an employee for protected speech. *Bryson v. City of Waycross*, 888 F.2d 1562, 1565 (11 Cir. 1989); *Pickering v. Board of Education*, 391 U.S. 563 (1968).

First the court must determine whether Mr. Lane "spoke as a citizen on a matter of public concern." *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006). In *Garcetti*, the Supreme Court identified two factors to be used in determining whether the public employee spoke as a citizen: (1) whether the speech occurred in the workplace, and (2) whether the speech was made as part of the public employee's job duties. *Garcetti*, 547 U.S. at 420-421. The Supreme Court made clear that, "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes," and that the statements of public employees retain their official status when "there is no relevant analogue to speech by citizens who are not government employees." *Id.* at 421, 423-24. In determining whether a statement is protected under the First Amendment, the court must "look to the content, form, and context of a given statement, as revealed by the whole record." *Vila v. Padron*, 484 F.3d 1334, 1340 (11th Cir. 2007). Here, Mr. Lane's testimony did not occur in the workplace, but he learned of the information that he testified about while working as Director at C.I.T.Y. Because he learned the information while performing in his official capacity as Director at C.I.T.Y., the speech can still be considered as part of his official job duties and not made as a citizen on a matter of public concern, as the Eleventh Circuit has ruled in similar cases.

In *Abdur-Rahman v. Walker*, the Eleventh Circuit ruled that sewer inspectors' reports were not made as citizens on matters of public concern because they were made pursuant to the inspectors' official job duties:

> [T]he reports of inspectors to their supervisors about sewer overflows they were required to investigate are not protected under the First Amendment. The inspector's reports about sewer overflows concerned information they requested and investigations they performed for the purpose of fulfilling their assigned job duties. The inspectors' reports 'owe their existence' to their official responsibilities and cannot reasonably be divorced from these responsibilities.

567 F.3d 1278, 1283 (11th Cir. 2009) (quoting *Garcetti*, 547 U.S. at 421). Additionally, in *Vila v. Padron*, the Eleventh Circuit ruled that a Community College Vice President's complaints about possible unethical and illegal conduct within the Community College fell "squarely within her official job duties and [were] not protected by the First Amendment." 484 F.3d 1334, 1339 (11th Cir. 2007).

In this case, Mr. Lane investigated Ms. Schmitz's job duties and ultimately terminated her employment with CACC because it was one of his job duties to hire and fire employees within the C.I.T.Y. Program. He fired Ms. Schmitz in his capacity as Director of C.I.T.Y., and he was subpoenaed to testify as to his investigation and subsequent termination of Ms. Schmitz in his capacity as Director of C.I.T.Y. Mr.

Lane argues that he could not have been called to testify in his official position as C.I.T.Y. Director because he testified in Ms. Schmitz's second trial after he was terminated from C.I.T.Y. The court does not find this argument persuasive because Mr. Lane was employed by C.I.T.Y. when he learned the information about which he testified, which is the relevant point in time. The court is persuaded that qualified immunity applies to Dr. Franks' action because Mr. Lane was not speaking as a citizen on a matter of public concern but rather speaking pursuant to his official job duties as Director of C.I.T.Y. The court, however, will also consider the parties' arguments about whether the fact that Mr. Lane testified pursuant to a subpoena establishes that Dr. Franks was acting in contravention to clearly established law when he testified in Ms. Schmitz's criminal case.

The only controlling cases concerning testimony given pursuant to a subpoena are *Martinez v. City of Opa-Locka*, 971 F.2d 708 (11th Cir. 1992) and *Morris v. Crow*, 142 F.3d 1379 (11th Cir. 1998). The Defendants argue that under *Martinez* and *Crow*, Dr. Franks was not on fair notice that Lane's testimony in his official capacity as Ms. Schmitz's former supervisor and pursuant to a subpoena was protected speech, such that basing Mr. Lane's termination on that testimony would violate the First Amendment. Mr. Lane argues that at the time of his termination *Martinez* conclusively established that a public employee could not be punished in retaliation for testifying pursuant to a subpoena.

In *Martinez*, the City hired the plaintiff as Director of the Purchasing Department. The City Commission, which had general legislative and policy-making authority, subpoenaed the plaintiff to testify concerning the purchasing practices of the City. At these appearances, the plaintiff testified that the City Manager violated the City's prescribed bid procedures. After making these statements and a similar statement to an investigator from the State Attorney's Office, the City Manager terminated the plaintiff's employment. The plaintiff filed a three count suit in federal court under 42 U.S.C. § 1983 against the City and the City Manager in his individual capacity claiming that she was fired in retaliation for her exercise of free speech. The Court ruled that the plaintiff's speech "clearly affected a matter of public concern" because she provided information concerning the expenditure of public funds and testified before the City's legislative body. *Martinez*, 971 F.2d at 712. The plaintiff's speech was protected when made pursuant to a subpoena and in front of a municipal body that had general legislative and policymaking authority. *Id.*

In *Morris v. Crow*, however, a deputy sheriff alleged the sheriff fired him in retaliation for deposition testimony he gave under subpoena in a civil suit implicating a fellow deputy in a fatal traffic accident. The Court found that the deputy did not testify under subpoena to "make public comment on sheriff's office policies and procedures [or] the internal workings of the department," but rather in compliance with the subpoena to testify truthfully. *Crow*, 142 F.3d at 1382. The Court affirmed the Sheriff's qualified immunity in the case, stating that, "[t]he mere fact

that [the deputy]'s statements were made in the context of a civil deposition cannot transform them into constitutionally protected speech." *Id.* at 1383.

The court notes that the Eleventh Circuit decided *Martinez* in 1992 and *Crow* in 1998; both decisions were rendered before the Supreme Court's decision in *Garcetti* in 2006 and the Eleventh Circuit's decisions in Walker in 2009 and Vila in 2007. Thus, the decisions relating to testimony given pursuant to subpoenas do not address whether the public employee's speech was made as part of his official duties and thus not as a citizen on a matter of public concern. Although the plaintiff's testimony pursuant to a subpoena was protected speech in *Martinez*, the mere presence of a subpoena did not defeat the officer's qualified immunity in *Crow*. Despite the plaintiff's contentions, *Martinez* and *Crow* do not create a clear and binding precedent so well-established that Dr. Franks should have known that he was violating Mr. Lane's Constitutional rights by terminating him, if he terminated him because of his testimony in Ms. Schmitz's criminal trial.

The fact intensive nature of First Amendment retaliation cases creates a maze of case law so discrete in its application and wavering in its precedential force that very rarely will the plaintiff be able to prove that "'case law, in factual terms, has . . . staked out a bright line.'" *Chesser v. Sparks*, 248 F.3d 1117, 1123 (2001) (quoting Post, 7 F.3d at 1557). The question to ask in qualified immunity cases is not whether "the very action in question has previously been held unlawful;" it is whether "the unlawfulness of the

action [was] apparent in the light of pre-existing law." *Williams v. Consol. City of Jacksonville*, 341 F.3d 1261, 2169-70 (11th Cir. 2003) (internal citations omitted). The court finds that a reasonable government official in Dr. Frank's position would not have had reason to believe that the Constitution protected Mr. Lane's testimony made pursuant to a subpoena at Ms. Schmitz's trial because the unlawfulness of his action was not "recognized . . . in a 'concrete and factually defined context.'" *Chesser*, 248 F.3d at 1122 (quoting *Lassiter v. Ala. A & M Univ. Bd. of Trustees*, 28 F.3d 1146, 1149 (11th Cir. 1994)). Thus, summary judgment is appropriate in this case.

IV. CONCLUSION

The Eleventh Amendment bars Mr. Lane's claims against CACC and Dr. Franks in his official capacity as President of CACC. Even if the Eleventh Amendment does not bar Mr. Lane's claim against Dr. Franks in his individual capacity, which the court finds it does, the court also finds that Mr. Lane's right to free speech under the First Amendment as a testifying witness under subpoena in a criminal trial was not clearly established, as is required under Saucier, to defeat Dr. Franks' qualified immunity. Thus, all of Mr. Lane's claims are barred by the Eleventh Amendment or the doctrine of qualified immunity. For these reasons, the court will GRANT Defendants' Motion for Summary Judgment and DISMISS WITH PREJUDICE all of Mr. Lane's claims against CACC and Dr. Franks. The court will simultaneously enter a separate order to that effect.

DONE and ORDERED this 18th day of October, 2012.

/s/

KARON OWEN BOWDRE
UNITED STATES DISTRICT JUDGE

OPPOSITION BRIEF

No. 13-483

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In The
Supreme Court of the United States

EDWARD LANE,

Petitioner,

v.

STEVE FRANKS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF RESPONDENT STEVE FRANKS IN OPPOSITION TO PETITIONER EDWARD LANE'S PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Under this Court's precedent, did the Eleventh Circuit correctly hold that petitioner Edward Lane's speech was not protected by the First Amendment where it found that that speech was made pursuant to his official job duties as the Director of the CITY Program at Central Alabama Community College?

2. Under both sovereign and qualified immunity doctrines, does respondent Steve Franks have immunity from petitioner Edward Lane's First Amendment retaliation claim brought pursuant to 42 U.S.C. § 1983?

PARTIES TO THE PROCEEDING BELOW

Pursuant to Rule 14.1(b), the parties to the proceeding below were petitioner and respondent. Central Alabama Community College was a defendant below, but was not part of the appeal to the Eleventh Circuit and is not part of this appeal. Central Alabama Community College is an instrumentality of the State of Alabama. It has no parent corporations and does not issue stock.

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STATEMENT OF THE CASE

Many of the alleged facts in petitioner Edward Lane's Statement of the Case are immaterial to the questions presented, misstated, and/or unsupported. As such, respondent Steve Franks states:

Respondent became President of Central Alabama Community College ("CACC"), an Alabama community college and an instrumentality of the State of Alabama, in January 2008. Pet. App. 10a, 13a-14a, 21a-22a. From September 2006 to January 2009, petitioner held a probationary position as Director of the Community Intensive Training for Youth Program ("CITY") at CACC. Pet. App. 2a-3a, 10a, 14a. In his job as Director, petitioner ran the CITY Program, including day-to-day operations, hiring and firing of employees, and making financial decisions. Pet. App. 10a.

Soon after becoming Director, and before respondent came to CACC, petitioner audited CITY's finances and discovered that then-state representative Suzanne Schmitz ("Schmitz") was listed on CITY's payroll but was not reporting for work and had not otherwise performed work for CITY. Pet. App. 2a, 11a. Petitioner thereafter terminated Schmitz's employment on October 19, 2006 after she refused to report to work. *Id.* "No one disputes that [petitioner] was acting pursuant to his official duties as CITY's Director when he investigated Schmitz's work activities, spoke with Schmitz and other CACC officials about Schmitz's employment, and ultimately terminated

Schmitz's employment." Pet. App. 7a; *see also* Pet. App. 10a.

The FBI investigated Schmitz and criminal charges were brought. Pet. App. 2a-3a, 12a. Petitioner was subpoenaed to testify and did testify in Schmitz's August 2008 criminal trial.[1] Pet. App. 2a-3a, 12a-13a. Respondent never instructed petitioner not to testify or otherwise attempt to prevent him from testifying. Pet. App. 18a. There has never been a dispute that respondent "was not aware of any statements by Ms. Schmitz that she would see to it that [petitioner] would lose his job after he testified against her." *Id.*; *see also* Pet. App. 15a.

At the 2008 criminal trial, petitioner testified about conversations he had with Schmitz about her work responsibilities and about Schmitz's failure to report to work even after he instructed her to do so. Pet. App. 3a. He also testified that he fired Schmitz because of her failure to come to work or do her job at CITY. Pet. App. 12a-13a. On these facts, both the court of appeals and the district court found that petitioner's speech was made pursuant to his official duties as the Director of CITY, and, thus, was not protected under the First Amendment. *See* Pet. App. 4a, 7a, 29a.

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[1] Petitioner's testimony at Schmitz's February 2009 trial is not at issue since respondent had already terminated petitioner when petitioner received notice that he would be testifying at that trial and respondent did not know about that trial until after it occurred. Pet. App. 18a.

Even so, respondent did not terminate petitioner's employment "soon" after he testified at Schmitz's criminal trial, but over four months later, along with 28 other CITY employees, due to financial reasons. *Cf.* Pet. 3 *with* Pet. App. 3a-4a, 12a-14a. Respondent testified that he did not rescind petitioner's termination when he rescinded the terminations of most of the other employees because, unlike the other employees, petitioner was still probationary. Pet. App. 3a-4a, 10a. Respondent's subsequent decision to name Larry Palmer as Interim Director of CITY actually saved CACC money. Pet. App. 15a.

Finally, petitioner does not state whether he is appealing the court of appeal's affirmance of the judgment in favor of respondent in his official or individual capacity or both. It is clear, however, that he is only appealing that affirmance insofar as the court of appeals determined that petitioner is not entitled to recover money damages. *See* Pet. i. Regardless, money damages are the only relief possible since the CITY Program of which petitioner was Director and to which he requested reinstatement "ceased to exist," and all CITY employees were terminated, over four years ago. Pet. App. 16a.

SUMMARY OF THE ARGUMENT

The Court should deny the writ because (i) the Eleventh Circuit's holding that petitioner's speech was not protected by the First Amendment is not in

conflict with this Court's precedent, and (ii) the alleged split among less than half the circuits does not warrant certiorari review. The Court should also deny the writ because, even accepting petitioner's argument that the Eleventh Circuit erred in holding that petitioner's speech was not protected, respondent Franks would still be entitled to immunity.

REASONS FOR DENYING THE WRIT

I. There is no conflict with this Court's precedent and the Court should refrain from deciding an issue that has been considered by less than half the circuit courts.

Petitioner misstates that the question on this appeal is whether subpoena testimony that "was not a part of the employee's ordinary job responsibilities" is protected by the First Amendment. *See* Pet. i. Both the court of appeals and the district court found that petitioner's speech *was* made pursuant to his official duties as the Director of CITY, and, thus, was not protected, which is consistent with this Court's decisions, including *Garcetti v. Ceballos*, 547 U.S. 410 (2006). *See* Pet. App. 4a, 7a, 29a.

As in *Garcetti*, the lower courts in this action found that "[t]he controlling factor" was that petitioner's speech was "made pursuant to his duties" as the Director of CITY. *See* 547 U.S. at 421. Petitioner's implication that the court of appeals erred in stating that petitioner's job description did not control, *see*

Pet. 5, is due to be rejected, since that is exactly what the Court held in *Garcetti*: "The proper inquiry is a practical one. . . . [T]he listing of a given task in an employee's written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties for First Amendment purposes." *See* 547 U.S. at 424-25. To the extent petitioner is claiming that the court of appeals somehow misapplied *Garcetti*, that is not a reason for granting his petition. *See* Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

Finally, the small number of circuits (only four) to have considered the issue of whether subpoena testimony is or should always be protected by the First Amendment weighs against granting certiorari at this time and favors allowing this issue to become more developed in the lower courts. This is especially compelling where the perceived "conflict" among circuits is, at most, just six years old.

II. The Court should refrain from deciding a constitutional question unnecessarily since respondent Steve Franks would still have immunity even if the Court adopts the interpretation of the First Amendment advanced by petitioner.

Respondent has always denied that petitioner's subpoenaed testimony had anything to do with the

termination of petitioner's employment. But, even accepting as true that it did, respondent would still have immunity. The Court should thus deny certiorari because even if it were to hold that petitioner's speech was protected by the First Amendment because he was speaking as a citizen and not in his capacity as the Director of CITY, as petitioner argues, the outcome would still be the same. *See Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2080 (2011) ("Courts should think carefully before expending scarce judicial resources to resolve difficult and novel questions of constitutional . . . interpretation that will have no effect on the outcome of the case.") (citation and quotation marks omitted); *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.").

Petitioner asks the Court to decide a constitutional question unnecessarily. *See Reichle v. Howards*, 132 S. Ct. 2088, 2093 (2012) (recognizing that the decision whether to "grant qualified immunity on the ground that a purported right was not 'clearly established' by prior case law, without resolving the often more difficult question whether the purported right exists at all[,] comports with our usual reluctance to decide constitutional questions unnecessarily") (*citing Pearson v. Callahan*, 555 U.S. 223, 227, 236, 241 (2009)); *Morse v. Frederick*, 551 U.S. 393, 428-29 (2007) (Breyer, J., concurring in part and dissenting

in part) ("More importantly, we should also adhere to a basic constitutional obligation by avoiding unnecessary decision of constitutional questions."). The Court should adhere to "the general rule of constitutional avoidance" and "the older, wiser judicial counsel not to pass on questions of constitutionality unless such adjudication is unavoidable" and deny the writ. *See Pearson*, 555 U.S. at 241 (citation, quotation marks, and ellipses omitted).

A. Sovereign Immunity

Respondent has sovereign immunity from petitioner's First Amendment retaliation claim in his official capacity because he is not a "person" subject to suit under 42 U.S.C. § 1983, by which petitioner's First Amendment retaliation claim is brought. Pet. App. 23a; *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989).

Similarly, regardless of whether petitioner's speech was protected, respondent has sovereign immunity from any claim for damages in both his official *and* individual capacities since CACC, and, consequently, the State of Alabama, not respondent, is the real party in interest. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100-02 (1984). The court of appeals did not find it necessary to reach this issue. Pet. App. 4a. However, as the district court found, respondent "seems to fit into the framework of a government official who is immune in his individual capacity because the state is the real party

in interest." Pet. App. 25a-26a, 34a. Thus, respondent would still be immune from petitioner's action even if the Court were to find that the court of appeals erred in holding that petitioner's speech was not protected. *See Pennhurst*, 465 U.S. at 100-02.

B. Qualified Immunity

Even if the Court adopts the interpretation of the First Amendment advanced by petitioner, qualified immunity would still preclude a claim for damages against respondent in his individual capacity (any official capacity claim being barred). This is because, at the very least, respondent was not on fair notice, and petitioner has never shown, that it was clearly established at the time of petitioner's August 2008 testimony that (1) petitioner's testimony was not made pursuant to his official duties as the Director of CITY, but, rather, was citizen speech protected by the First Amendment, and (2) that testimony pursuant to a subpoena is always protected.

"Qualified immunity shields government officials from civil damages liability unless the official violated a . . . constitutional right that was clearly established at the time of the challenged conduct." *Reichle v. Howards*, 132 S. Ct. 2088, 2093 (2012). "To be clearly established, a right must be sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Id.* (citation and quotation marks omitted). While the Court does "not require a case directly on point, . . . existing precedent

must have placed the . . . constitutional question beyond debate." *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2083 (2011). "The constitutional question in this case falls far short of that threshold." *Id.*

"Here, the right in question is not the general right to be free from retaliation for one's speech," *Reichle*, 132 S. Ct. at 2094, but the more specific right to be free from retaliation on account of subpoenaed testimony, even where the testimony was made pursuant to an employee's official duties. However, "[t]his Court has never held that there is such a right." *See id.* If it were to do so now, respondent would still have qualified immunity because neither this Court's precedent nor Eleventh Circuit precedent, at the time of the challenged conduct, was clearly established. *See id.* at 2093-94. As correctly recognized by the court of appeals, Eleventh Circuit precedent established just the opposite. Pet. App. 5a-8a; *see also* Pet. 23 (acknowledging that "the Eleventh Circuit applied its precedent" in disposing of this action below).

Petitioner's argument that this is not a settled issue among four circuits *supports* respondent's qualified immunity from this action.[2] *See Pearson*,

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[2] Most of the cases cited by petitioner to support his argument that there is a conflict among the circuits were decided in the last three years, after petitioner's termination. Such cases are irrelevant to the issue of whether the law was clearly established at the time of that termination. *See Ashcroft, v. al-Kidd*, 131 S. Ct. at 2083 ("existing precedent must have placed

(Continued on following page)

555 U.S. at 244-45 ("'If judges thus disagree on a constitutional question, it is unfair to subject [a defendant] to money damages for picking the losing side of the controversy.'") (citation omitted). That another circuit may have held that respondent is not immune is irrelevant. *See* Pet. 14. The law of other circuits could not clearly establish law in the Eleventh Circuit. *See, e.g.*, *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) ("Under the established federal legal system the decisions of one circuit are not binding on other circuits."); *In re Korean Air Lines Disaster of Sept. 1, 1983*, 829 F.2d 1171, 1176 (D.C. Cir. 1987) ("The federal courts . . . should strive to avoid conflicts, but each has an obligation to engage independently in reasoned analysis. Binding precedent for all is set only by the Supreme Court . . . .").

"[T]he salient question . . . is whether the state of the law [when respondent terminated petitioner] gave [respondent] fair warning that [his] alleged treatment of [petitioner] was unconstitutional." *See Hope v. Pelzer*, 536 U.S. 730, 741 (2002). The state of this Court's law, and certainly of the Eleventh Circuit's law, failed to do so. Petitioner's general statement that "the Eleventh Circuit's holding is contrary to this Court's precedents regarding both public employee speech and the role of sworn testimony[,]" Pet. 14, is not enough to overcome respondent's qualified

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the . . . constitutional question beyond debate") (citation and quotation marks omitted).

immunity. "[T]he right allegedly violated must be established, not as a broad general proposition, but in a particularized sense so that the contours of the right are clear to a reasonable official . . . ." *Reichle*, 132 S. Ct. at 2094 (citations and quotation marks omitted). That is not the case here. *See id.* at 2093-94.

Petitioner's reliance on the general law in *Garcetti v. Ceballos*, 547 U.S. 410 (2006), for determining whether an employee's speech is speech as a citizen is inapposite. As discussed in Section I., the holdings of the lower courts in this action are consistent with *Garcetti*. Even so, as recognized by petitioner, the Court expressly *declined* to establish "'a comprehensive framework for defining the scope of an employee's duties where there is room for serious debate.'" Pet. 16 (*citing Garcetti*, 547 U.S. at 424). Nor could Justice Souter's dissent in *Garcetti*, cited by petitioner on page 20 of his petition, create clearly established law. *See* 21 C.J.S. *Courts* § 198 ("Dissenting opinions are not binding."); *see also, e.g.*, *Purcell v. BankAtlantic Fin. Corp.*, 85 F.3d 1508, 1513 (11th Cir. 1996) ("[A] dissenting Supreme Court opinion is not binding precedent."); *accord United States v. Ameline*, 409 F.3d 1073, 1083 n.5 (9th Cir. 2005).

Likewise, petitioner's citations to multiple cases for the broad general proposition that subpoenaed testimony is important, a point which respondent does not dispute, should be given little weight. *See Reichle*, 132 S. Ct. at 2094. None of those cases establish that subpoenaed testimony is always protected speech. Only *Branzburg v. Hayes*, 408 U.S. 665

(1972), and *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991), discuss First Amendment jurisprudence at all, but in the unrelated context of a journalist's obligation to respond to a grand jury subpoena when confidential information or a confidential informant is involved. *See Reichle*, 132 S. Ct. at 2094.

Finally, *Rehberg v. Paulk*, 132 S. Ct. 1497 (2012) and *Snyder v. Phelps*, 131 S. Ct. 1207 (2011), cited by petitioner on pages 19 and 21 of his petition, could not have clearly established that subpoena testimony was always protected speech when respondent terminated petitioner in 2009. *See Ashcroft v. al-Kidd*, 131 S. Ct. at 2083. Even so, *Snyder* dealt with the separate issue of whether a person's speech was on a matter of public concern, which does not change the result in this action. Even if petitioner's speech was on a matter of public concern, as petitioner argues, *see* Pet. 21-22, it was not clearly established at the time of that speech that petitioner was speaking as a citizen, as opposed to pursuant to his responsibilities as Director of the CITY Program, which is a separate analysis from whether his speech involved a matter of public concern. *See generally Garcetti*, 547 U.S. 410.

In short, the Court should not reach the constitutional question because qualified immunity clearly bars petitioner's action. *See, e.g.*, *Reichle*, 132 S. Ct. at 2093.

CONCLUSION

The petition for a writ of certiorari should be denied.

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REPLY BRIEF

RECORD AND BRIEFS

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IN THE

Supreme Court of the United States

EDWARD LANE,

Petitioner,

v.

STEVE FRANKS,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Respondent's brief in opposition makes three critical concessions. First, respondent does not dispute that the courts of appeals squarely disagree whether the First Amendment protects subpoenaed testimony by public employees, and whether that rule is clearly established. Indeed, respondent makes no attempt to distinguish the precedents of the Third, Seventh, and Ninth Circuits, all of which would have held that petitioner's speech was protected, and that qualified immunity did not bar his claim for damages. Second, respondent does not dispute that the questions presented are important. This case not only implicates freedom of speech and the integrity of the judicial process, it also has tremendous practical significance: sworn testimony by public employees is a powerful tool in the fight against corruption, and the threat of retaliation undermines that tool by deterring employees from speaking. Third, respondent does not dispute that under this Court's precedents, subpoenaed testimony is inherently an obligation of citizenship, and not one incident to public employment. When, as here, such speech relates to a matter of public concern, it earns the First Amendment's robust protections for citizen speech.

In light of these concessions, this Court should grant certiorari. The contentions in the brief in opposition do not suggest a different result.

I. The Acknowledged Circuit Conflict Warrants This Court's Review.

Respondent does not dispute that the decision below conflicts with decisions in at least three circuits. In fact, the Eleventh Circuit itself acknowledged the

disagreement. *See* Pet. App. 7a n.3. Nevertheless, respondent argues that the Court should not resolve the conflict for two reasons. First, he argues that the decision below was correct because the lower courts held that petitioner's speech was part of his official duties, so it is not protected under *Garcetti v. Ceballos*, 547 U.S. 410 (2006). *See* BIO 4-5. Second, he downplays the significance of the conflict, arguing that "only four" circuits have decided this issue, and the conflict is "just six years old." *Id.* 5. Neither argument justifies denying certiorari.

1. Respondent's first argument—that the decision below is consistent with *Garcetti*—assumes the answer to the first question presented. The lower courts concluded that when an employee's sworn testimony *describes* events that occurred during the course of his duties, the testimony itself *becomes* part of the employee's official duties—even if the employee was compelled to testify by a federal subpoena, and even if his job does not ordinarily require him to testify. *See* Pet. App. 7a, 29a.

In arguing (BIO 4) that the decision below is consistent with *Garcetti*, respondent seems to assume that the lower courts' conclusions must be accepted as true. In fact, they must not. Whether petitioner's subpoenaed testimony can be characterized as part of his official duties is not an assumed premise of the first question presented, but the heart of the question itself. Moreover, in the Eleventh Circuit, "[w]hether the subject speech was made by the public employee speaking as a citizen or as part of the employee's job responsibilities is a question of law for the court to

decide," and therefore subject to *de novo* review. Pet. App. 6a. And this case was decided at summary judgment, review of which is always *de novo*, with inferences drawn in petitioner's favor.[1] So no deference to the lower courts' holdings is warranted.

Respondent also erroneously suggests (BIO 5) that the court of appeals merely misapplied *Garcetti*. Actually, the court held as a matter of law that whether an employee testifies pursuant to a subpoena is irrelevant to the First Amendment inquiry. *See* Pet. App. 6a-7a; *see also Morris v. Crow*, 142 F.3d 1379, 1382 (11th Cir. 1998). In so doing, it acknowledged that other circuits apply a different legal rule, and would have reached a different result. Pet. App. 7a n.3. Thus, the Eleventh Circuit's error was not an isolated misapplication of the correct standard, but instead the conscious application of an entirely different standard to facts that are indistinguishable (or *a fortiori*) from contrary cases in other circuits.

2. Respondent's attempts to minimize the circuit split also fail. First, this Court's intervention is necessary because positions on both sides of the split are entrenched. On one side, the Seventh Circuit announced its rule in *Fairley v. Fermaint*, 482 F.3d

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[1] Respondent also does not dispute that the propriety of deciding the case at summary judgment is itself the subject of a circuit conflict. As the petition explained, four circuits treat this matter as a question of law, while four circuits regard it as a mixed question of fact and law, such that if the parties dispute it, summary judgment is inappropriate. Pet. 11-12 n.2.

897, 902-03 (7th Cir. 2007), and has consistently applied it, *see Chrzanowski v. Bianchi*, 725 F.3d 734, 741-42 (7th Cir. 2013); *Morales v. Jones*, 494 F.3d 590, 598 (7th Cir. 2007). The Ninth Circuit has similarly held employee testimony protected, including in a recent *en banc* decision. *See Dahlia v. Rodriguez*, --- F.3d ---, No. 10-55978, 2013 WL 4437594 (9th Cir. Aug. 21, 2013) (en banc); *Karl v. City of Mountlake Terrace*, 678 F.3d 1062, 1069-72 (9th Cir. 2012); *Clairmont v. Sound Mental Health*, 632 F.3d 1091, 1105-06 (9th Cir. 2011).

On the other side of the split, the Eleventh Circuit's position is also fixed. Its rule dates to *Morris v. Crow*, 142 F.3d 1379 (11th Cir. 1998), which the court has never questioned—despite this Court's intervening decision in *Garcetti*, and despite the acknowledged circuit split. Thus, in *Green v. Barrett*, 226 F. App'x 883, 887 (11th Cir. 2007), the court applied *Morris* to reject the employee's argument that the First Amendment protects testimonial speech. The court then denied the employee's petition for rehearing *en banc*. Here, the Eleventh Circuit again applied *Morris*, deeming it "the law in this Circuit on the question of public employee speech per a subpoena in the context of judicial proceedings," notwithstanding its recognition that "other circuits seem to have decided this issue differently." Pet. App. 7a n.3. There is accordingly no reasonable prospect the Eleventh Circuit will reverse itself, and respondent does not contend otherwise.

Second, this issue arises with remarkable frequency. In addition to the circuits identified in the

petition, the D.C. Circuit has suggested that subpoenaed testimony is protected, although voluntary testimony may not be. *See Bowie v. Maddox*, 653 F.3d 45, 47 n.1 (D.C. Cir. 2011). A survey of federal cases yields more than twenty illustrative examples of First Amendment retaliation claims involving testimony.[2]

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[2] *See, e.g.*, *Caruso v. N.Y.C.*, — F. Supp.2d —-, No. 06-cv-59997(RA), 2013 WL 5382206, at *15-18 (S.D.N.Y. Sept. 26, 2013); *Walker v. Town of Hennessey*, — F. Supp. 2d —-, No. 11-cv-1364-HE, 2013 WL 3058085, at *8 (W.D. Okla. June 17, 2013); *Seifert v. Unified Gov't of Wyandotte Cnty/Kan. City*, No. 11-2327-JTM, 2013 WL 2631682, at *8-9 (D. Kan. June 12, 2013); *Klein v. Cnty. of Bucks*, No. 12-4809, 2013 WL 1310877, at *6 (E.D. Pa. Apr. 1, 2013); *Bowyer v. D.C.*, 910 F. Supp. 2d 173, 202-03 (D.D.C. 2012); *Carr v. City of Camden*, No. 09-4717 (NLH)(KMW), 2012 WL 4051884, at *6 (D.N.J. Sept. 13, 2012); *Hayburn v. City of Phila.*, No. 11-6673, 2012 WL 3238344, at *4 (E.D. Pa. Aug. 7, 2012); *Frisenda v. Inc. Vill. of Malverne*, 775 F. Supp. 2d 486, 510 (E.D.N.Y. 2011); *Minten v. Weber*, 832 F. Supp. 2d 1007, 1022-24 (N.D. Iowa 2011); *Moore v. Money*, No. 11-cv-122, 2011 WL 5966957, at *4 (S.D. Ohio Nov. 29, 2011); *Ramirez v. Cnty. of Marin*, No. 10-02889 WHA, 2011 WL 5080145, at *9 (N.D. Cal. Oct. 25, 2011); *Proper v. Sch. Bd. of Calhoun Cnty. Fla.*, No. 10-cv-287-RS-EMT, 2011 WL 3608678, at *3 (N.D. Fla. Aug. 12, 2011); *Matthews v. Lynch*, No. 07-cv-739 (WWE), 2011 WL 1363783, at *1 (D. Conn. Apr. 11, 2011), *aff'd*, 2012 WL 1873657 (2d Cir. May 24, 2012); *Whitfield v. Chartiers Valley Sch. Dist.*, 707 F. Supp. 2d 561, 571-77 (W.D. Pa. 2010); *Reid v. City of Atlanta*, No. 08-cv-01846-JOF, 2010 WL 1138456, at *8 (N.D. Ga. Mar. 22, 2010); *Kerstetter v. Pa. Dep't of Corrs. SCICoal Twp.*, No. 08-cv-1984, 2010 WL 936457, at *7-8 (M.D. Pa. Mar. 12, 2010); *Mullins v. N.Y.C.*, 634 F. Supp. 2d 373, 390-91 (S.D.N.Y. 2009), *aff'd*, 626 F.3d 47 (2d Cir. 2010); *Foster v. Thompson*, No. 05-cv-305-TCK-FHM, 2008 WL 4682264, at *11-12 (N.D. Okla. Oct. 21, 2008); *Davis v. City of E. Orange*, No. 05-3720 (JLL), 2008 WL

And commentators have also noted the "split over whether testimony given by public employees pursuant to the subpoena power constitutes protected speech." *E.g.*, Note, *Be a Liar or You're Fired! First Amendment Protection for Public Employees Who Object to Their Employer's Criminal Demands*, 66 Vand. L. Rev. 1541, 1555 (2013).

Finally, on a question of such importance, four circuits and six years of division are plenty. As long as the conflict persists, the First Amendment will mean something different in the Eleventh Circuit than it does in at least three others. Such inconsistency is anathema to the very notion of a single federal Constitution. Because uniformity in this area of the law is particularly important, the Court should grant certiorari now instead of allowing the conflict to fester. Moreover, this case is an ideal vehicle to decide the questions presented, which were the only issues on which the Eleventh Circuit opined.

In sum, the questions presented give rise to an acknowledged circuit split over important questions of federal law. This Court should grant certiorari to resolve the conflict.

4328218, at *5 (D.N.J. Sept. 17, 2008); *Hook v. Regents of Univ. of Cal.*, 576 F. Supp. 2d 1223, 1232 (D.N.M. 2008), *aff'd*, 394 F. App'x 522 (10th Cir. 2010); *Williams v. Johnson*, 537 F. Supp. 2d 141, 151-52 (D.D.C. 2008).

II. Respondent's Qualified Immunity Argument Does Not Undermine The Case For Certiorari.

The petition presents two questions: whether a First Amendment violation occurred; and whether respondent is entitled to qualified immunity. Pet. i. Like the first question, the qualified immunity question is itself an important issue of federal law on which the courts of appeals disagree. Respondent does not dispute this, but instead argues that the Eleventh Circuit's qualified immunity holding was correct, and therefore obviates the need to reach the first question.

For several reasons, respondent's contention is irrelevant to this Court's certiorari determination. First, if qualified immunity applies at all, it applies only to petitioner's claim for damages, not his claim for prospective relief.[3] Thus, qualified immunity cannot resolve the entire case. Second, in the face of the conceded circuit split, respondent's argument only illustrates why this Court should grant certiorari: if the Eleventh Circuit's qualified immunity decision was correct, then the Court should grant certiorari to correct the contrary holdings of three circuits;

---

[3] Respondent mistakenly argues that petitioner "is only appealing" the Eleventh Circuit's holding as it relates to damages. BIO 3. Not so. The petition seeks review of the Eleventh Circuit's entire judgment, waiving only petitioner's claims against the college, and under state law. *See* Pet. 4 n.1. The first question presented plainly encompasses petitioner's official-capacity and individual-capacity First Amendment claims against respondent, and both remain at issue. *Id.* i.

conversely, if the Eleventh Circuit was incorrect, then the Court should grant certiorari and reverse. Either way, the Court should grant certiorari. Finally, even assuming that the Court could avoid the First Amendment question by ruling on qualified immunity grounds, it should only do so after considering the merits. *Cf. Reichle v. Howards*, 132 S. Ct. 2088, 2093 (2012) ("We granted certiorari on two questions . . . We elect to address only the [qualified immunity] question.").

Respondent is also wrong because qualified immunity does not protect his decision to fire petitioner in retaliation for subpoenaed testimony. Qualified immunity does not apply if an "official violated a statutory or constitutional right that was clearly established at the time of the challenged conduct." *Id.* When respondent terminated petitioner, all of the principles underlying petitioner's claim were clearly established by this Court's precedents. To wit:

- "The First Amendment's guarantee of freedom of speech protects government employees from termination because of their speech on matters of public concern." *Bd. of Cnty. Comm'rs v. Umbehr*, 518 U.S. 668, 675 (1996) (emphasis removed). *See also Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006); *Connick v. Myers*, 461 U.S. 138, 147 (1983); *see* Pet. 14-17.

- Subpoenaed testimony is citizen speech—not employee speech—because a subpoena independently obligates a citizen to testify. *See, e.g.*, *United States v. Calandra*, 414 U.S. 338, 345 (1974) ("The duty to testify has long been recognized as a basic obligation

that every citizen owes his Government."); *see* Pet. 18-20.

- Testimony describing an elected official's misconduct constitutes speech on a matter of public concern. *See, e.g.*, *Connick*, 461 U.S. at 148 (explaining that speech that would allow the public to "evaluat[e] the performance of . . . an elected official" would constitute speech on a matter of public concern, as would speech that "bring[s] to light actual or potential wrongdoing or breach of public trust"); see Pet. 21-22.

- The fact that petitioner's testimony described corruption in his workplace does not mean that he spoke in the course of his official duties. Indeed, society has a heightened interest in receiving firsthand accounts of events that occur in government offices. *See, e.g.*, *Garcetti*, 547 U.S. at 420 ("'Were [public employees] not able to speak on [the operation of their employers], the community would be deprived of informed opinions on important public issues.'") (quoting *San Diego v. Roe*, 543 U.S. 77, 82 (2004) (per curiam)); *Pickering v. Bd. of Educ. of Twp. High School. Dist. 205*, 391 U.S. 563, 571-72 (1968) (explaining that because teachers are well-informed about school issues, "it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal"); *see* Pet. 22-23.

Together, these authorities clearly establish that a public employer may not retaliate against an employee for sworn testimony in a corruption trial, even when the testimony describes events that occurred in the workplace. The Eleventh Circuit's contrary conclusion is erroneous, and should be reversed.

II. Respondent's Sovereign Immunity Argument Does Not Undermine The Case For Certiorari.

Respondent also argues that he is entitled to sovereign immunity. BIO 7-8. That issue is not before the Court. As respondent acknowledges, the Eleventh Circuit expressly declined to reach it. *Id.* 7; Pet. App. 4a. Moreover, it is not "fairly included" in either question presented because it raises Eleventh Amendment issues that fall outside the boundaries of the First Amendment questions raised by the petition. S. Ct. R. 14.1(a). There is accordingly no realistic prospect that this Court would reach out to address sovereign immunity in the first instance as an alternative ground for affirmance. Instead, this is an issue that the Eleventh Circuit can address on remand.

Furthermore, respondent offers no analysis beyond a single sentence quoted from the district court opinion. *See* BIO 7-8. But there is a reason that the Eleventh Circuit did not affirm on this basis. When the court addresses this issue on remand, it will likely conclude that respondent is not, in fact, entitled to immunity.

First, the Eleventh Amendment does not bar petitioner's official-capacity claim for reinstatement to the "position in which he would have worked absent the Defendant's retaliatory treatment." Pet. App. 23a-24a. Under *Ex parte Young*, 209 U.S. 123 (1908), sovereign immunity does not shield a state official's violations of federal law from a claim for prospective injunctive relief. While respondent has argued that *Ex*

parte Young is inapplicable because petitioner's termination does not constitute an *ongoing* violation of federal law, every circuit to have addressed the question, including the Eleventh Circuit, has held to the contrary that a claim for reinstatement is precisely the sort of prospective injunctive relief authorized by *Ex parte Young*. *See, e.g.*, *Cross v. Ala. Dep't of Mental Health & Mental Retardation*, 49 F.3d 1490, 1503 (11th Cir. 1995) ("Appellees' request for reinstatement is not barred by the Eleventh Amendment."); *Lassiter v. Ala. A&M Univ. Bd. of Trs.*, 3 F.3d 1482, 1485 (11th Cir. 1993), *vacated on other grounds*, 28 F.3d 1146 (1994) (same). *See also State Emps. Bargaining Agent Coal. v. Rowland*, 494 F.3d 71, 96 (2d Cir. 2007) (collecting cases and explaining that "[e]very Circuit to have considered the issue, including our own, has held that claims for reinstatement to previous employment satisfy the *Ex parte Young* exception to the Eleventh Amendment's sovereign immunity bar").[4]

---

[4] Respondent argues that reinstatement is unavailable because the CITY program was terminated along with its employees. BIO 3. However, as petitioner pointed out below, the program was renamed and moved to a new department, and at least some CITY employees were transferred along with it. *See* Pet. C.A. Reply Br. 6 n.4. Petitioner has asked for reinstatement to the position he would be in but for the retaliation. The lower courts can determine what position that might be. To the extent respondent argues that the restructuring of the CITY program somehow renders *Ex parte Young* inapplicable, the Second Circuit, at least, has rejected that argument, and the Eleventh Circuit can address it on remand. *See Rowland*, 494 F.3d at 96-97.

Second, sovereign immunity does not bar petitioner's individual-capacity claim for damages because "a suit for money damages may be prosecuted against a state officer in his individual capacity for unconstitutional or wrongful conduct fairly attributable to the officer himself, so long as the relief is sought not from the state treasury but from the officer personally." *Alden v. Maine*, 527 U.S. 706, 757 (1999). Respondent asserts that Alabama is the real party in interest, but does not explain why. To the extent that he has some other as-yet-unidentified argument to make—and to the extent it has been preserved—the proper forum to present it is the Eleventh Circuit on remand.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 26, 2013

PETITIONER'S BRIEF

RECORD AND BRIEFS

Supreme Court, U.S.
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No. 13-483

IN THE

Supreme Court of the United States

EDWARD LANE,

Petitioner,

v.

STEVE FRANKS, IN HIS INDIVIDUAL CAPACITY, AND SUSAN BURROW, IN HER OFFICIAL CAPACITY AS ACTING PRESIDENT OF CENTRAL ALABAMA COMMUNITY COLLEGE,

Respondents.

On a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

1. Is the government categorically free under the First Amendment to retaliate against a public employee for truthful sworn testimony that was compelled by subpoena and was not a part of the employee's ordinary job responsibilities?

2. Does qualified immunity preclude a claim for damages arising from such retaliation?

PARTIES TO THE PROCEEDINGS BELOW

Pursuant to Rule 14.1(b), the parties to the proceedings below include petitioner, respondent Steve Franks, and Central Alabama Community College, a defendant-appellee below that is no longer a party to the case. Respondent Susan Burrow was added to the case after certiorari was granted because she has assumed the office of president of Central Alabama Community College, which Franks formerly held.

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Alabama Supreme Court: Double-Dipping Must Go!, Politics Alabama, May 30, 2009, http://politicsalabama.blogspot.com/2009/05/alabama-supreme-court-double-dipping.html 19

Brett J. Blackledge, *Legislator Tells Grand Jury About College Job*, The Birmingham News, Mar. 14, 2008, http://blog.al.com/twoyear/2008/03/march_14_2008_legislator_tells.html 19

Mike Cason, *Sen. Quinton Ross Might Challenge Alabama's "Double Dipping" Law*, AL.com, Oct. 23, 2013, http://blog.al.com/wire/2013/10/sen_quinton_ross_running_for_r.html 19

Double Dipping Measure Approved, Cullman Times, Aug. 23, 2007, http://www.cullmantimes.com/local/x1116129279/Double-dipping-measure-approved 19

Patrick Fitzgerald, *The Costs of Public Corruption—And the Need for the Public to Fight Back*, U.S. Dep't of Justice, http://www.justice.gov/usao/briefing_room/fin/corruption.html 23

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BRIEF FOR THE PETITIONER

Petitioner Edward Lane respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The court of appeals' opinion (Pet. App. 1a-8a) is unpublished. The district court's opinion (Pet. App. 9a-35a) is unpublished.

JURISDICTION

The court of appeals issued its judgment on July 24, 2013. Pet. App. 1a. The petition for a writ of certiorari was filed on October 15, 2013. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISION

The First Amendment to the Constitution of the United States provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." U.S. Const. amend. I.

STATEMENT OF THE CASE

This First Amendment retaliation case arises from a public employee's truthful subpoenaed testimony in a federal fraud prosecution. Petitioner claims that respondent Steve Franks terminated his employment in retaliation for petitioner's subpoenaed testimony during the prosecution of a corrupt legislator who abused her office to defraud a state program for at-risk youth. Affirming the district court, the Eleventh

Circuit held as a matter of law that respondent was permitted to fire petitioner for his testimony.

1. In 2006, Central Alabama Community College (CACC) hired petitioner as acting director of the Community Intensive Training for Youth Program (CITY). Pet. App. 2a. CITY was a program for at-risk youth who otherwise might face incarceration. *Id.* The program provided skills and guidance that the children could use to complete school and achieve their potential. CITY operated multiple locations, using both state and federal funds. *Id.* 10a, 12a. "In his job as Director, [petitioner] ran the program, including day-to-day operations, hiring and firing of employees, and making financial decisions." *Id.* 10a. It is undisputed that petitioner's official duties did not include testifying in court. *See id.* 7a.

This case arises from petitioner's testimony in a federal fraud prosecution brought by the United States Attorney for the Northern District of Alabama against Suzanne Schmitz, an Alabama state legislator. The United States prosecuted Schmitz for fraudulently arranging and concealing a no-show job for herself at CITY.

The prosecution subpoenaed petitioner to testify before a federal grand jury and at two criminal trials. *Id.* 12a. Petitioner truthfully testified that, in the course of an audit of CITY's finances, he learned that Schmitz was receiving paychecks from CITY—and in fact was one of its highest-paid employees—without ever reporting for work. *Id.* 2a-3a, 12a-13a. Petitioner attempted to require Schmitz to perform tasks commensurate with her position, including counseling

children. Schmitz refused. *Id.* 3a. Petitioner was then warned by CITY and CACC employees that he should tread carefully, lest he provoke retaliation from Schmitz or the legislature. *Id.* 2a, 11a. And indeed, after petitioner terminated Schmitz for nonperformance, Schmitz vowed to retaliate against him, informing another CITY employee that she planned to "get [petitioner] back," and that, if petitioner ever sought funds for CITY from the legislature, she would inform him, "you're fired." *Id.* 2a, 11a.

In the wake of petitioner's testimony, the grand jury returned an eight-count indictment charging Schmitz with mail fraud and fraud in connection with a program receiving federal funds. In 2008 and 2009, petitioner testified—again under subpoena—at Schmitz's two criminal trials (the first of which ended in a mistrial). *Id.* 3a, 12a-13a. A jury convicted Schmitz of all counts but one. *See United States v. Schmitz*, 634 F.3d 1247, 1258 (11th Cir. 2011). Affirming Schmitz's conviction for mail fraud, the Eleventh Circuit explained that:

> Schmitz engaged in a calculated and extensive pattern of fraudulent conduct designed to allow her to collect a state-government salary while performing almost no work. She accomplished this scheme through demonstrably false reports and time sheets. And, when people started asking questions, she used her status as state legislator to keep the scheme going.

Id. at 1265. In total, Schmitz fraudulently obtained $177,251.82 in public funds. *Id.* at 1258. She was

sentenced to thirty months' imprisonment and forced to pay restitution. *Id.*

In January 2009, after petitioner testified at Schmitz's first trial, and just before CITY was due to request additional funds from the state legislature, respondent Franks—then President of CACC—fired petitioner, Pet. App. 3a, ostensibly for financial reasons, *id.* 14a. Indeed, CITY terminated twenty-nine employees (including petitioner) who were deemed "probationary employees" because they had not been at CITY long enough to earn tenure. *Id.* 3a. But just two days later, Franks rescinded all the terminations except those of petitioner and one other employee, who had been at CITY for less than six months. *Id.* 3a-4a, 16a-17a.[1]

2. Petitioner filed this lawsuit, alleging that his termination violated the First Amendment. Pet. App. 4a.[2] His complaint alleges that Franks—either collaborating with or under pressure from Schmitz's political allies, or to appease them—terminated petitioner in retaliation for his truthful subpoenaed

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[1] Franks claimed that he reinstated the other employees because he came to doubt whether they were still in their probationary periods. But like the others, petitioner had been employed by CACC for more than six months, which was the probationary period under the contract he had signed in August 2007. Pet. App. 11a, 16a.

[2] Petitioner also brought claims against CACC, as well as claims under 42 U.S.C. § 1985 and the state whistleblower statute, Ala. Code § 36-26A-3. Petitioner did not pursue these claims on appeal, and they are not at issue here. Pet. App. 4a n.1.

testimony. *Id.* 4a, 14a-15a. Petitioner sued Franks in both his individual and official capacities, *id.* 4a, seeking damages as to the former and equitable relief as to the latter, including reinstatement to the "position in which he would have worked absent the Defendant's retaliatory treatment." *Id.* 23a.

Franks moved for summary judgment, which the district court granted. Pet. App. 10a. The court recognized that "genuine issues of material fact exist in this case concerning Dr. Franks' true motivation for terminating Mr. Lane's employment," *id.* 21a, but it nonetheless granted Franks' motion, holding that the First Amendment did not apply because petitioner testified as an employee, not a citizen. The court explained that:

> Mr. Lane's testimony did not occur in the workplace, but he learned of the information that he testified about while working as Director at C.I.T.Y. Because he learned the information while performing in his official capacity as Director at C.I.T.Y., the speech can still be considered as part of his official job duties and not made as a citizen on a matter of public concern.

Id. 29a. The court also ruled in the alternative that Franks was entitled to sovereign immunity in both his official and individual capacities. *See id.* 25a-26a.

3. The Eleventh Circuit affirmed with respect to the district court's First Amendment holding. Pet. App. 4a. The court of appeals read its precedent to hold that "[e]ven if an employee was not required to make the speech as part of his official duties, he enjoys

no First Amendment protection if his speech owes its existence to [the] employee's professional responsibilities and is a product that 'the employer itself has commissioned or created." *Id.* 5a (citing *Abdur-Rahman v. Walker*, 567 F.3d 1278, 1286 (11th Cir. 2009)) (internal quotation marks omitted). It elaborated that subpoenaed testimony regarding facts that relate to a public employee's official duties is therefore not protected because it is not made "as a public comment" on the employer's practices. *Id.* 6a (quotation marks omitted).

Applying that standard, the Eleventh Circuit explained that the fact "[t]hat Lane testified about his official activities pursuant to a subpoena and in the litigation context, in and of itself, does not bring Lane's speech within the protection of the First Amendment." *Id.* 7a. It brushed aside that petitioner's "official duties did not distinctly require him to testify at criminal trials" by stating that "formal job descriptions do not control." *Id.* But the court of appeals did not believe that petitioner was actually required to testify because of his job. Instead, petitioner's testimony was unprotected, the court concluded, because "the subject matter of Lane's testimony touched only on acts he performed as part of his official duties," and "nothing evidences that Lane testified at Schmitz's trial primarily in [his] role as a citizen or that his testimony was an attempt to comment publicly on CITY's internal operations." *Id.* 7a-8a (internal quotation marks omitted). The court of appeals therefore held that "as a matter of law," petitioner could not "state a claim for retaliation under the First Amendment." *Id.* 8a.

The Eleventh Circuit did not identify any court that had adopted its view of the First Amendment, and acknowledged that "[o]ther circuits seem to have decided this issue differently." *Id.* 7a n.3. It cited as examples the Third and Seventh Circuits' decisions holding that the First Amendment protected subpoenaed testimony. *Id.* (citing *Morales v. Jones*, 494 F.3d 590, 598 (7th Cir. 2007), and *Reilly v. City of Atlantic City*, 532 F.3d 216 (3d Cir. 2008)).

The court further held that because no First Amendment violation had occurred at all, it necessarily followed that Franks was entitled to qualified immunity against any claim for damages. Pet. App. 4a n.2. Having resolved the entire case as a matter of First Amendment law and qualified immunity, the court declined to "decide about Franks's defense of sovereign immunity." *Id.* 4a.

This Court granted certiorari. 133 S. Ct. 999 (2014) (mem).[3]

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[3] Subsequently, the state of Alabama advised petitioner that Franks had resigned. It therefore substituted respondent Susan Burrow, the current president of CACC, for the official capacity claim. The state attorney general's office represents Burrow. Franks remains the respondent for the claim against him in his individual capacity, and is separately represented.

SUMMARY OF ARGUMENT

This Court's precedents clearly establish that because petitioner's testimony related to matters of public concern, and was not offered pursuant to his official duties, the First Amendment protects it. This is true whenever a public employee testifies under subpoena, and not in the course of his duties. In such cases, employers may impose discipline for the testimony only if they show that the testimony's disruptive effects on the workplace outweigh the employee's interest in testifying, and society's interest in hearing the testimony.

For more than half a century, this Court has recognized that the First Amendment protects public employees from retaliation for speech relating to matters of public concern. The Court summarized its settled precedents in *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006), explaining that "[s]o long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively."

Garcetti also recognized an exception to this general rule: when an employee speaks not as a citizen, but instead pursuant to his official duties, the First Amendment does not impede employer discipline. The rationale for the *Garcetti* exception is that although public employees retain the rights of citizenship, employers have the right to control employees' job performance, even if the employees' duties also include writing and speaking.

Under this Court's long-settled precedents, the First Amendment protects petitioner's subpoenaed testimony at Schmitz's federal corruption prosecution because in every relevant sense, petitioner's testimony constituted citizen speech upon a matter of public concern—and not speech in petitioner's capacity as CITY's director. It therefore falls squarely within the ordinary and long-settled rule protecting such speech, and not the *Garcetti* exception.

First, the content, form, and context of petitioner's testimony establish that it related to matters of public concern. The content—which revealed corruption by an elected official, and touched upon a scandal that rocked Alabama's community college system—spoke to issues and values at the heart of the First Amendment. The form and context—sworn, subpoenaed testimony in support of a federal corruption prosecution, delivered at a grand jury and then at a public trial—likewise establish the inherently public nature of petitioner's statements, as well as their civic value. Indeed, this Court has been emphatic that subpoenaed testimony is speech of the highest value, as it enables the judicial system to achieve its ultimate goal: the truth.

Second, petitioner spoke as a citizen, and not as an employee, when he testified. It is undisputed that petitioner's responsibilities were managing CITY's staff and budget, and overseeing its day-to-day operations—not testifying in federal prosecutions, or in any other judicial proceeding. Thus, petitioner was not subpoenaed to testify as CITY's director speaking on the organization's behalf, but instead as an

individual and a fact witness. He alone had to decide whether to comply, to assert privilege, or to move to quash or narrow the subpoena. He alone risked contempt or perjury sanctions if he resisted the subpoena. When he testified, he alone was responsible for choosing his words. And in the course of responding, he took time away from his work to describe Schmitz's corruption to the grand jury and at Schmitz's first trial, and he then testified at Schmitz's second trial even though he had already been terminated from his job. These facts establish that petitioner testified as a citizen, and not as a public employee, even though the subject matter of his testimony described events that occurred at work.

In this case, as in others in which the Court has recognized protection for employee speech, the First Amendment interests transcend petitioner's individual interest in speaking, and include society's interest in hearing his truthful testimony. A long line of this Court's precedents holds that every citizen is obligated—as a citizen, and regardless of the identity of his employer—to testify for the benefit of the public. This Court has held that the integrity of the judicial process hinges on the candor of witnesses, and has facilitated testimony by construing protections for witnesses broadly and privileges against testifying narrowly. Petitioner's truthful testimony—which enabled the executive branch to root out corruption, and the federal courts to administer the law—is an iconic example of a citizen participating in valuable public discourse, and thus engaging in behavior that the First Amendment has always protected. Moreover, society's interest is especially pronounced in

corruption cases, in which subpoenaed testimony is often critical to uncover well-concealed illegality, and in which the perpetrators often are powerful individuals capable of intimidating witnesses.

Against these weighty First Amendment interests, there is no risk that First Amendment protection for petitioner's testimony will unduly impair the smooth functioning of public offices, and no reason consistent with *Garcetti* to deny protection to his speech. Although a public employer may control official communications to ensure that they further the employer's interests and mission, an employer has no right to dictate how employees testify in court; indeed, attempting to do so would be unlawful, and possibly criminal. That is because the purpose of sworn testimony is not to advance the employer's mission, but instead to promote society's search for truth—a mission that employers have no authority to impede.

This Court's settled precedents thus compel reversal on both the First Amendment issue, and on the issue of qualified immunity. Immunity is not available when, as here, an official violates a clearly established right. By January 2009, when petitioner was terminated, all of this Court's modern public employee speech cases supported his right to testify. If petitioner can prove the other elements of his claim at trial, he is therefore entitled not only to prospective relief from respondent Burrow, but also to damages from respondent Franks.

In the court below, Franks did not rely on this Court's precedents. Instead, he argued that petitioner was not entitled to relief under circuit precedent. That

contention is unpersuasive. Even if Franks' description of the lower court's decisions was correct, those cases cannot trump this Court's controlling precedents. Franks' argument also fails on its own terms. On-point circuit cases—from the Eleventh Circuit and other circuits that have addressed speech resembling petitioner's—clearly establish his right to testify.

The judgment of the Eleventh Circuit should therefore be reversed.

ARGUMENT

When public officials violate a citizen's constitutional rights, they can be held liable for prospective relief. If the citizen's right was clearly established when the violation occurred, the officials are also liable for damages. This case presents two questions: whether the First Amendment protects petitioner's subpoenaed testimony at all; and whether petitioner's right to testify was clearly established so as to support a claim for damages. These questions substantially overlap, and neither one is difficult. Put simply, no state official—in January 2009 or today—could reasonably believe that it is permissible to retaliate against a witness for his subpoenaed testimony assisting a federal corruption prosecution. This brief will prove as much, without approaching the word limit.[4]

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[4] References to subpoenaed testimony in this brief refer to situations, like this case, in which an employee testifies on his

I. This Court's Precedents Clearly Establish That The First Amendment Protects Petitioner's Testimony.

The First Amendment protects truthful subpoenaed testimony because it is citizen speech on a matter of public concern. When a citizen—whether a public employee or not—responds to a subpoena from a court of law commanding him to testify, his testimony contributes to public discourse and society's pursuit of truth and justice. The citizen has a strong interest in the content of his testimony, and society has perhaps an even stronger interest in hearing it. The First Amendment has always safeguarded these interests against official retaliation.

1. For more than six decades, this Court has recognized that public employers may not require citizens to forsake their constitutional rights as a condition of employment. *See, e.g.*, *Keyishian v. Bd. of Regents*, 385 U.S. 589, 605-06 (1967); *Shelton v. Tucker*, 364 U.S. 479, 487-88 (1960); *Wieman v. Updegraff*, 344 U.S. 183, 190-91 (1952). In *Pickering v. Board of Education*, 391 U.S. 563, 574 (1968), this Court—recognizing that "the threat of dismissal from public employment is . . . a potent means of inhibiting speech"—applied this principle to hold that "absent

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own behalf as a fact witness. Different concerns may apply when an employee testifies as the representative of his employer—whether under Federal Rule of Civil Procedure 30(b)(6), or as a designee for an agency before an investigative or legislative body. The Court need not address such cases here.

proof of false statements knowingly or recklessly made by him, a [public employee's] exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment." *Id.* (footnote omitted). The Court also recognized that if the speech in question "interfered with the regular operation" of the employer, then discipline might be warranted. *Id.* at 573. It therefore admonished courts, when necessary, to "balance . . . the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.* at 568.

Since then, this Court has consistently affirmed that the "First Amendment's guarantee of freedom of speech protects government employees from termination because of their speech on matters of public concern." *Bd. of Cnty. Comm'rs v. Umbehr*, 518 U.S. 668, 675 (1996) (emphasis removed); *see also, e.g.*, *Connick v. Myers*, 461 U.S. 138, 145 (1983); *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 415-16 (1979); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 283-84 (1977); *Perry v. Sindermann*, 408 U.S. 593, 598 (1972). The First Amendment does not preclude employer discipline for speech that does not relate to matters of public concern—*e.g.*, homemade pornography, *City of San Diego v. Roe*, 543 U.S. 77, 78, 84 (2004) (per curiam), or workplace grievances, *Connick*, 461 U.S. at 147—but if the speech even "touch[es] upon a matter of public concern," the First Amendment applies, *id.* at 149.

If the speech does touch upon a matter of public concern, then a public employer contemplating an adverse response must demonstrate that its interests in the efficient provision of public services outweigh the First Amendment interests in protecting the speech. *See id.* "[T]he state's burden in justifying a particular discharge varies depending upon the nature of the employee's expression." *Id.* A strong showing of disruption is required to justify discipline for high value speech—*e.g.*, speech that allows the public to "evaluat[e] the performance of . . . an elected official," or speech that "bring[s] to light actual or potential wrongdoing or breach of public trust." *See id.* at 148.

2. This Court synthesized its holdings in *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006), reaffirming that "[s]o long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively." The Court clarified that this rule does not, however, protect employees who merely "make statements pursuant to their official duties." *Id.* at 421.

The Court began by citing the long line of precedents establishing that "the First Amendment protects a public employee's right . . . to speak as a citizen addressing matters of public concern." *See id.* at 417 (citing *Pickering*, 391 U.S. at 568; *Connick*, 461 U.S. at 147; *Rankin v. McPherson*, 483 U.S. 378, 384 (1987); *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 466 (1995)). This is because "a citizen who works for the government is nonetheless a citizen," and does not relinquish either the rights or

obligations of citizenship by accepting public employment. *See Garcetti*, 547 U.S. at 419.

The Court further explained that "the First Amendment interests at stake extend beyond the individual speaker," and include "the public's interest in receiving the well-informed views of government employees . . . ." *Id.* Relying on settled precedent, the Court reasoned that public employees' participation is often necessary for "informed, vibrant dialogue in a democratic society," and it recognized that "widespread costs may arise when dialogue is repressed." *Id.* (citing *Pickering*, 391 U.S. at 572; *Roe*, 543 U.S. at 82; *Nat'l Treasury Emps. Union*, 513 U.S. at 470).

Against these interests, the Court noted that "[g]overnment employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services." *Garcetti*, 547 U.S. at 418. The Court thus refused "to recognize First Amendment claims based on employees' work product," because "[t]he prospect of [First Amendment] protection does not . . . invest [employees] with a right to perform their jobs however they see fit." *Id.* at 422.

Applying that standard, the Court held that when deputy prosecutor Richard Ceballos prepared a memorandum for his superiors, the First Amendment did not protect that document because Ceballos did not write it as a citizen, but instead "as a prosecutor fulfilling a responsibility to advise his supervisor about how best to proceed with a pending case." *Id.* at 421.

The Court stressed that "[w]hen he went to work and performed the tasks he was paid to perform, Ceballos acted as a government employee. The fact that his duties sometimes required him to speak or write does not mean that his supervisors were prohibited from evaluating his performance." *Id.* at 422. Thus, Ceballos' supervisors were entitled to discipline him in order to ensure that his "official communications [we]re accurate, demonstrate[d] sound judgment, and promote[d] the employer's mission." *Id.* at 423.

The Court was explicit that its ruling did not turn on the fact that "[t]he memo concerned the subject matter of Ceballos' employment," because "[t]he First Amendment protects some expressions related to the speaker's job." *Id.* at 421 (citing *Pickering*, 391 U.S. at 573, *Givhan*, 439 U.S. at 414). Indeed, it is "'essential that [public employees] be able to speak out'" on questions related to their employment, as they are the ones "'most likely to have informed and definite opinions'" on those subjects. *Id.* (quoting *Pickering*, 391 U.S. at 572).

3. Applying these well-settled precedents here, petitioner's testimony in the Schmitz prosecution plainly constituted speech "on a matter of public concern." *Garcetti*, 547 U.S. at 418. Speech deals with matters of public concern "when it can be fairly considered as relating to any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public." *Snyder v. Phelps*, 131 S. Ct. 1207, 1216 (2011) (internal quotation marks and citations omitted). To

make this determination, the Court "examine[s] the content, form, and context," of the speech. *Id.* (internal quotation marks omitted); *Connick*, 461 U.S. at 147-48.

The content, form, and context of petitioner's testimony all establish that it addressed matters of public concern. Indeed, petitioner's testimony passes the test on its content alone. This Court has already recognized that speech that allows the public to "evaluat[e] the performance of . . . an elected official" is of public concern, as is speech that "bring[s] to light actual or potential wrongdoing or breach of public trust." *Connick*, 461 U.S. at 148. Petitioner's speech accomplished that by describing Schmitz's corruption. Moreover, the Schmitz trial generated substantial news attention and public interest.[5] And the broader issue underlying the trial—of legislators supplementing their income by taking jobs in the community college system, a practice known as "double dipping"—likewise generated substantial news

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[5] *See, e.g.*, *State Representative Schmitz Indicted For Fraudulent Scheme Which Netted Her $177,251.82*, States News Service, Jan. 31, 2008; Virginia Martin, *CITY Coordinator Testifies About Schmitz's Work*, The Birmingham News, Feb. 17, 2009, http://blog.al.com/spotnews/2009/02/city_coordinator_testifies_abo.html; *Sue Schmitz Was Convicted of Federal Fraud Charges and Removed as Alabama Representative*, The Birmingham News, Feb. 25, 2009, http://blog.al.com/twoyear/2009/02/sue_schmitz_was_convicted_of_f.html; *Sue Schmitz to Spend 30 Months in Prison*, Fox, July 22, 2009, http://www.myfoxal.com/story/10772838/sue-schmitz-to-spend-30-months-in-prison.

interest, as well as additional prosecutions, changes in personnel in the community college system, and ultimately reform of state ethical rules.[6]

The form and context of petitioner's testimony also establish its public character and value. That is generally true of subpoenaed testimony in judicial proceedings—particularly in criminal cases, in which the public interest in law and order stands front and center. Respondents have already conceded "that subpoenaed testimony is important." BIO 11. But that understates the point. As this Court has explained, "arriving at the truth is a fundamental goal of our legal system." *United States v. Havens*, 446 U.S. 620, 626 (1980). Consequently:

> The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts . . . . To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for

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[6] *See* Brett J. Blackledge, *Legislator Tells Grand Jury About College Job*, The Birmingham News, Mar. 14, 2008, http://blog.al.com/twoyear/2008/03/march_14_2008_legislator_tells.html; *Double Dipping Measure Approved*, Cullman Times, Aug. 23, 2007, http://www.cullmantimes.com/local/x1116129279/Double-dipping-measure-approved; *Alabama Supreme Court: Double-Dipping Must Go!*, Politics Alabama, May 30, 2009, http://politicsalabama.blogspot.com/2009/05/alabama-supreme-court-double-dipping.html; Mike Cason, *Sen. Quinton Ross Might Challenge Alabama's "Double Dipping" Law*, AL.com, Oct. 23, 2013, http://blog.al.com/wire/2013/10/sen_quinton_ross_running_for_r.html.

> the production of evidence needed either by the prosecution or by the defense.

United States v. Nixon, 418 U.S. 683, 709 (1974).

Recognizing that "'public policy . . . requires that the paths which lead to the ascertainment of truth should be left as free and unobstructed as possible,'" this Court has recognized broad immunities for testifying witnesses in both trials and grand juries, including for public employees. *Briscoe v. LaHue*, 460 U.S. 325, 333 (1983) (quotation marks omitted); *Rehberg v. Paulk*, 132 S. Ct. 1497, 1506 (2012). This protection is necessary to ensure that witnesses "testify fully and frankly," without fear of "retribution." *Douglas Oil Co. v. Petrol Stops NW*, 441 U.S. 211, 219 (1979). Simultaneously, "[b]ecause of the key role of the testimony of witnesses in the judicial process, courts have historically been cautious about privileges" against testifying, *Nixon*, 418 U.S. at 710 n.18, and the Court has consistently rejected efforts to create or "expansively construe[]" such privileges "in derogation of the search for truth," *id.* at 710. Thus, the obligation to testify outweighs a journalist's interest in protecting his sources, *Branzburg v. Hayes*, 408 U.S. 665, 690-91 (1972), and even a president's executive prerogative, *see Nixon*, 418 U.S. at 713.

Thus, individually and together, the content, form, and context of petitioner's testimony all establish that he spoke on matters of public concern.

4. Petitioner also clearly spoke as a citizen, and not in his capacity as director of the CITY program. This inquiry into whether an employee testified

pursuant to his duties "is a practical one." *Garcetti*, 547 U.S. at 424. As a practical matter, petitioner's responsibilities included overseeing CITY's day-to-day operations, and managing its staff and budget. Pet. App. 10a. In the ordinary course of his duties, petitioner would never expect to testify in a federal criminal prosecution, or for that matter in any court. Indeed, not even the court of appeals believed that petitioner's testimony was part of his job responsibilities. The Eleventh Circuit acknowledged—and respondents never disputed—that petitioner's "official duties did not distinctly require him to testify at criminal trials." *Id.* 7a.

Petitioner was thus subpoenaed in his individual capacity as a fact witness, and not as a surrogate for CITY. *Cf. e.g.*, Fed. R. Civ. P. 30(b)(6) (requiring subpoenaed organizations to designate witnesses to testify on their behalf). Petitioner alone had to decide whether to comply with the subpoena, ignore it, assert privilege, or move to quash or narrow it. In answering the questions put to him, petitioner chose his own words: No third party was permitted to influence his testimony, *see* 18 U.S.C. § 1512 (criminalizing witness tampering), and, subject to petitioner's obligation not to lie, the content of his testimony was entirely up to him. Additionally, if petitioner had lied, or otherwise failed to comply with the subpoena, he alone would have borne the risk of perjury or contempt sanctions, including possible "lengthy incarceration." *Chrzanowski v. Bianchi*, 725 F.3d 734, 472 (7th Cir. 2013), *petition for cert. filed* 82 U.S.L.W. 3282 (Oct. 18, 2013) (No. 13-498) (collecting examples); *see also* 18 U.S.C. § 401(3) (permitting federal courts to punish,

"by fine or imprisonment, or both," those who fail to comply with a "lawful writ, process, order, rule, decree, or command"). Finally, when petitioner testified to the grand jury and at Schmitz's first trial, he spent time away from his office and his work to do so. When petitioner testified at Schmitz's second trial, he had already been terminated from his position—again establishing that he did not testify in the course of his duties as a public employee (which, by then, were nonexistent), but instead as a citizen.

Consistent with these facts, this Court's precedents clearly establish that the obligation to respond to a subpoena is "shared by *all citizens*" by virtue of their citizenship—and not by virtue of their employment. *See Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991) (emphasis added) (citing *Branzburg*, 408 U.S. at 669); *see also United States v. Calandra*, 414 U.S. 338, 345 (1974) ("The duty to testify has long been recognized as a basic obligation that every citizen owes his Government."); *Piemonte v. United States*, 367 U.S. 556, 559 n.2 (1961) ("Every citizen of course owes to his society the duty of giving testimony to aid in the enforcement of the law."); *United States v. N.Y. Tel. Co.*, 434 U.S. 159, 175 n.24 (1977) ("[P]rivate citizens have a duty to provide assistance to law enforcement officials when it is required."). The overwhelming weight of long-settled precedent thus establishes that when public employees respond to subpoenas, they, like any other citizen, are fulfilling their duty to society, not to their employer. And when public employees—*e.g.*, the President—have attempted to use their official roles to evade a subpoena, this

Court has established that they, like any other citizen, owe answers to the courts. *See Nixon*, 418 U.S. at 713.

This Court's cases also establish that subpoenaed testimony, like other citizen speech, vindicates a core "First Amendment interest": "the public's interest in receiving the well-informed views of government employees." *Garcetti*, 547 U.S. at 419; *see also Roe*, 543 U.S. at 82; *Waters v. Churchill*, 511 U.S. 661, 674 (1994); *Pickering*, 391 U.S. at 572-73. That interest is particularly strong in corruption investigations, which, as explained by the Department of Justice, "cannot be successful without truthful witnesses . . . ." Patrick Fitzgerald, *The Costs of Public Corruption—And the Need for the Public to Fight Back*, U.S. Dep't of Justice, http://www.justice.gov/usao/briefing_room/fin/corruption.html. Because "voluntary assistance from the public in corruption cases is often hard to come by, we use many investigative techniques that assist us in gathering evidence and requiring cooperation, such as the use of grand jury subpoenas, grants of immunity, consensual recordings, and wiretaps." *Id.* But if the First Amendment fails to protect public employees who testify, there is a substantial risk that they will be chilled from doing so, especially in cases, like this one, involving powerful public figures who threaten retaliation. *See* Pet. App. 2a, 11a.[7] And if witnesses

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[7] As this case illustrates, the existing patchwork of whistleblower protections cannot vindicate society's interest in combating corruption. Indeed, petitioner sought relief under the state whistleblower statute, but his claim failed because the statute protects neither employees of the higher education system

are chilled from testifying, perpetrators are likely to continue or expand their corrupt misdeeds.

On the other hand, the concern for the employer's supervisory interests that motivated this Court to deny protection to the memorandum in *Garcetti* is completely absent here. No public employer has a legitimate interest in controlling the content of a subpoenaed witness's testimony. Indeed, any attempt to do so might even be criminal, depending on the means employed. *See* 18 U.S.C. § 1512. To the extent that anybody has the right to supervise the content and conduct of testimony, it is the court to which such testimony is presented, and not the witness' employer. Indeed, affording managerial discretion to public employers over the content of subpoenaed testimony would pit their interests directly against those of the courts—a nonsensical outcome that would undermine the integrity of the judicial process, inhibit the search for truth, and subvert the values that the First Amendment seeks to uphold. Because the employer's supervisory interest in subpoenaed testimony is nil, *Garcetti* provides no support for departing from the Court's prior precedent and stripping that testimony of protection.[8] Indeed, *Garcetti*'s emphasis on the

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nor testimony in federal court. *See Lane v. Cent. Ala. Cmty. Coll.*, No. 11-cv-0883-KOB, 2012 WL 5873351, at *2 (N.D. Ala. Nov. 20, 2012).

[8] In *Pickering*, this Court concluded that the First Amendment protected a teacher's letter to the editor criticizing school budgeting decisions because "the interest of the school administration in limiting teachers' opportunities to contribute to

sanctity of citizen speech dovetails seamlessly with this Court's holdings that subpoenaed testimony is a citizen's obligation.

5. These rules were clearly established at the time petitioner was terminated, and so qualified immunity does not protect respondents from liability. Qualified immunity shields government officials "from liability for civil damages" unless their conduct "violate[d] clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).[9] The immunity "ensure[s] that before they are subjected to suit, officers are on notice their conduct is unlawful." *Saucier v. Katz*, 533 U.S. 194, 206 (2001). It thus "balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009).

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public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public." 391 U.S. at 573. So too here: CACC and Franks had no greater interest in controlling petitioner's testimony than they would have had in controlling testimony by any other citizen—that is to say, they have zero interest in both cases.

[9] Because qualified immunity applies only to claims for damages, only respondent Franks is even potentially entitled to it; it does not shield respondent Burrow from petitioner's official-capacity claim for prospective relief.

Immunity is therefore "lost when plaintiffs point either to 'cases of controlling authority in their jurisdiction at the time of the incident' or to 'a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful.'" *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2086 (2011) (Kennedy, J., concurring) (quoting *Wilson v. Layne*, 526 U.S. 603, 617 (1999)). This Court does "not require a case directly on point before concluding that the law is clearly established." *Stanton v. Sims*, 134 S. Ct. 3, 5 (2013) (internal quotation marks omitted). Instead, it is enough if "in light of pre-existing law," the "unlawfulness" of the official's conduct is "apparent." *Hope v. Pelzer*, 536 U.S. 730, 740 (2002).

Thus, the question for immunity purposes is: Could Franks reasonably have believed in January 2009 that he was permitted to retaliate against an employee witness assisting in a federal corruption prosecution? As explained above, the answer under this Court's precedents is clearly "No." Consequently, immunity does not apply, and if petitioner can prove the other elements of his claim at trial, then he is entitled not only to prospective relief, but also to damages.

6. The Eleventh Circuit reached a contrary result by adopting flawed logic and badly misreading *Garcetti*. The court of appeals held that petitioner's sworn testimony was not entitled to protection because, in its view, "nothing evidences that Lane testified at Schmitz's trial 'primarily in [his] role as a citizen' or that his testimony was an attempt to

comment publicly on CITY's internal operations." Pet. App. 8a. Quoting language from *Garcetti*, the court also reasoned that "[e]ven if an employee was not required to make the speech as part of his official duties, he enjoys no First Amendment protection if his speech 'owes its existence to [the] employee's professional responsibilities' and is 'a product that "the employer itself has commissioned or created."'" *Id.* 5a (quoting *Abdur-Rahman v. Walker*, 567 F.3d 1278, 1286 (11th Cir. 2009), which in turn quoted *Garcetti*). The Eleventh Circuit erred, and it did so plainly.

First, petitioner *did* testify primarily—indeed solely—in his "role as a citizen." Petitioner's employer did not command him to testify—a federal court did, using a subpoena issued to petitioner as a citizen and an individual, and not as the director of CITY.

This Court's precedents do not require more. Neither *Garcetti* nor any of this Court's modern public employee speech cases authorize courts to engage in a free-roving inquiry into whether a public employee spoke "primarily" as a citizen. If, for example, an employee gave a speech at his church, proclaiming that he was speaking "as a Christian," that would not strip his speech of protection. If a public employee wrote a letter to a newspaper editor, claiming that she was writing "as a woman," that would not strip her speech of protection. Such speech all falls within the larger category of "citizen speech": it is the sort of speech that typical citizens engage in every day, which the First Amendment has always protected. Testifying, which is also every citizen's duty, *e.g.*, *Calandra*, 414 U.S. at 345, likewise falls within that

category. Under this Court's cases, the only time that speech on a topic of public concern falls outside the protected category of citizen speech is "when public employees make statements pursuant to their official duties." *See Garcetti*, 547 U.S. at 421.

The court of appeals provided no reason, and no authority, for its contrary conclusion. In fact, it acknowledged that "Lane's official duties did not distinctly require him to testify at criminal trials." *Id.* 7a. The court of appeals brushed past that critical fact by stating that "formal job descriptions do not control." But even accepting that general premise,[10] the court never explained how petitioner was doing his job, whether formally or otherwise, by testifying in federal criminal proceedings. All it said was that "the subject matter of Lane's testimony touched only on acts he performed as part of his official duties." *Id.* But as even the court of appeals acknowledged, under this Court's precedents, that is not enough to strip speech of First Amendment protection. *Id.* Indeed, this Court has repeatedly held that because public employees

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[10] That statement is taken out of its context in *Garcetti*. When this Court held that formal job descriptions do not necessarily define the scope of an employee's official duties, it did so in order to "reject . . . the suggestion that employers can restrict employees' rights by creating excessively broad job descriptions." 547 U.S. at 424. The Court's reasoning thus also rejects the Eleventh Circuit's attempt in this case to define petitioner's duties using an "excessively broad" brush that obscures "the duties [he] actually [was] expected to perform." *Id.* at 424-25.

have unique knowledge about their workplaces, statements related to their jobs often will warrant protection. *See, e.g.*, *Garcetti*, 547 U.S. at 419, *Roe*, 543 U.S. at 82; *Pickering*, 391 U.S. at 572.

Second, the Eleventh Circuit's finding that petitioner was not "attempt[ing] to comment publicly on CITY's internal operations" is equally flawed, most obviously because petitioner *did* comment publicly on CITY's internal operations. His testimony revealed—to a grand jury, and then to the world—that for years before petitioner took over as director, Schmitz had taken home government paychecks without doing any work. That is an important comment about CITY's internal operations, and it is also a comment about Schmitz's corruption—also a matter of public concern. *See, e.g.*, *Connick*, 461 U.S. at 148. Moreover, petitioner's voluntary compliance with the subpoena manifested his personal desire to testify. The fact that petitioner was *also* fulfilling his duty as a citizen does not justify stripping his speech of protection.

More deeply, the court of appeals erred by attempting to parse petitioner's motivations for testifying, and by concluding that speech is protected only when the speaker subjectively intends to make a public comment. Such a motive-based rule would unlock Pandora's box, permitting governments to censor speech that is not motivated solely by the speaker's personal desire to express an opinion—including speech for commercial gain, answers to questions posed by others, and statements made for any other ulterior motive, *e.g.*, to impress a third party. All of these, however, are typical citizen speech.

A motive-based rule would thus "chill core political speech" by inviting authorities to punish speech on matters of public concern and insulate their actions by alleging prohibited intent (or, as in this case, the absence of protected intent). *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 468 (2007). Moreover, a motive-based test "could lead to the bizarre result that identical" statements would receive different levels of First Amendment protection, based on speculative and difficult assessments of the speaker's motivation. *Id.*

A motive-based approach also improperly discounts "the public's interest in receiving the well-informed views of government employees" on matters of public concern. *Garcetti*, 547 U.S. at 419; *Roe*, 543 U.S. at 82; *Givhan*, 439 U.S. at 414; *Pickering*, 391 U.S. at 572-73. That interest persists no matter what motivates a witness to testify: Whether the witness testifies for the personal satisfaction of expressing himself, to comply with a civic duty, both, or neither, the public benefits when the Constitution protects his speech. On the other hand, the opposite rule means that society suffers.

That is why, in a variety of First Amendment contexts, this Court has wisely rejected efforts to strip valuable public speech of protection because of the speaker's motivation. *See, e.g.*, *Wis. Right to Life*, 551 U.S. at 468 (rejecting an intent-based standard to evaluate political ads); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 53 (1988) (prohibiting use of ill motive to create liability for speech about public figures). Indeed, in *Garcetti*, the Court held that whether an employee derives "personal gratification

from" speaking is "immaterial" to whether the speech is protected; the only relevant inquiry is whether the employee actually was doing his job at the time he spoke. 547 U.S. at 421.

Independently, the Eleventh Circuit's "public comment" holding is incompatible with this Court's recognition—since at least 1979—that the First Amendment protects public employee speech that was not intended as a public comment. *See, e.g., Givhan*, 439 U.S. at 415-16 ("Neither the [First] Amendment itself nor our decisions indicate that this freedom is lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public. We decline to adopt such a view of the First Amendment.").

Third, the Eleventh Circuit was simply wrong to hold that "[e]ven if an employee was not required to make the speech as part of his official duties, he enjoys no First Amendment protection if his speech owes its existence to [the] employee's professional responsibilities and is a product that the employer itself has commissioned or created." Pet. App. 5a (internal citations and quotation marks omitted). The second half of this sentence was wrenched from its context in *Garcetti*, where this Court stated:

> Ceballos wrote his disposition memo because that is part of what he, as a calendar deputy, was employed to do. It is immaterial whether he experienced some personal gratification from writing the memo; his First Amendment rights do not depend on his job satisfaction. The significant point is that the memo was written

> pursuant to Ceballos' official duties. Restricting speech that *owes its existence to a public employee's professional responsibilities* does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what *the employer itself has commissioned or created.* Contrast, for example, the expressions made by the speaker in *Pickering*, whose letter to the newspaper had no official significance and bore similarities to letters submitted by numerous citizens every day.

547 U.S. at 421-22 (emphasis added).

The topic sentence of this paragraph makes it clear that it does not support the Eleventh Circuit's conclusion that "[e]ven if an employee is not required to make the speech as part of his official duties," it may nevertheless be unprotected. Pet. App. 5a. In fact, this Court plainly stated the opposite: that speech "owes its existence" to the employer, and is "commissioned and created" by the employer, when it is what the employee "was employed to do," or when it is uttered "pursuant to [the employee's] official duties," and not merely when it has some attenuated relationship with the employee's job responsibilities. *Garcetti*, 547 U.S. at 421-22. Put another way, *Garcetti* bars "First Amendment claims based on government employees' work product," *id.* at 422; it does not bar every claim that "concern[s] the subject matter of [the speaker's] employment," *id.* at 421.

A broader rule would chill employees from speaking critically about their workplaces, because

they could never be sure whether a court would decide that the speech somehow "owed its existence" to their jobs. That would contravene not only *Garcetti*, but all of this Court's modern public employee speech cases. For example, in any case in which the employee communicated internally, including *Givhan* and *Connick*, the speech could be unprotected because the employee would not have been in a position to have those conversations but for her employment. In any whistleblowing case, a broad reading of the "owes its existence" language could strip the employee's speech of protection because the employee would not have learned of the relevant facts but for his employment. And in any case in which the employee was motivated by a desire for better working conditions or more effective government, including perhaps *Pickering* itself, the speech could be unprotected because a non-employee would not share that motivation.

Applied to subpoenaed testimony, the court of appeals' broad reading of the "owes its existence" language contravenes this Court's precedents holding that witnesses deserve protection, and that courts should take every measure to ensure candid and complete testimony. This Court's pristine history of protecting witnesses counsels against adopting a rule that permits retaliation against them.

The court of appeals' rule is also difficult to administer because it requires courts to engage in probing inquiries about why an employee spoke. *Cf. Wis. Right to Life*, 551 U.S. at 468 (explaining that an intent-based test not be workable, and would require, at a minimum, costly, fact-dependent litigation). Here,

that would require an inquiry into why petitioner was subpoenaed, and a further inquiry into why he answered questions the way he did. It would also require an investigation as to whether he could have learned the information that he learned on the job in another way. The inquiry would be comparably thorny in every case, and it finds no footing in this Court's decisions.[11]

II. Eleventh Circuit Precedent And Persuasive Authorities Also Clearly Established Petitioner's Right To Testify.

By the time this Court decided *Garcetti v. Ceballos*, 547 U.S. 410 (2006), petitioner's First Amendment right to testify in a federal corruption prosecution was clearly established. It is unsurprising, then, that in presenting his case to the court of appeals, Franks relied not on this Court's

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[11] As noted in the petition (at 11-12 n.2), this case also implicates a circuit conflict over whether the citizen vs. official duties inquiry constitutes a question of law, a question of fact, or a mixed question. The Eleventh Circuit held that, like the public concern inquiry in this Court's pre-*Garcetti* cases, this issue presents a question of law. Pet. App. 6a. But unlike the "public concern" inquiry, the question whether an employee spoke pursuant to his duties necessarily requires factual findings—including what the employee's duties are, and whether he was performing them at the time he spoke. Here, petitioner disputes that he spoke pursuant to his official duties. To the extent that this Court agrees that this constitutes either a question of fact or a mixed question, it should therefore reverse the decisions below, which affirmed summary judgment for respondents despite the existence of disputed questions of material fact.

cases, but on circuit precedent to justify his actions. *See* Franks C.A. Br. 40-53. That reliance was misplaced, and cannot support a claim for qualified immunity.

1. First, when this Court's controlling precedents clearly establish a right, contrary lower-court decisions cannot undermine it. *See United States v. Gallo*, 195 F.3d 1278, 1284 (11th Cir. 1999) ("As a rule, our prior precedent is no longer binding once it has been substantially undermined or overruled by either a change in statutory law or Supreme Court jurisprudence or if it is in conflict with existing Supreme Court precedent."). This Court's precedents clearly establish that because petitioner spoke on a matter of public concern, and did not do so pursuant to his official duties, the First Amendment protects petitioner's testimony. No contrary lower court precedent can justify immunity in the face of that controlling law.

2. Respondents' argument is also flawed on its own terms because Eleventh Circuit precedent and the most on-point precedents from other circuits actually supported petitioner when he was terminated in January 2009. Thus, even if this Court's precedents did not themselves clearly establish petitioner's right, "'controlling authority in [the Eleventh Circuit] at the time of the incident,'" and "'a consensus of cases of persuasive authority'" did. *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2086 (2011) (Kennedy, J., concurring) (quoting *Wilson v. Layne*, 526 U.S. 603, 617 (1999)).

The Eleventh Circuit case that most closely resembles this one is *Martinez v. City of Opa-Locka*,

971 F.2d 708 (11th Cir. 1992). There, the employee worked for the city as the director of its purchasing department, responsible for overseeing procurement. *Id.* at 710. The City Commission, sitting as a Board of Inquiry and investigating misconduct, subpoenaed her to testify regarding procurement practices. *Id.* The employee testified that the City Manager had violated bid procedures to purchase substantial amounts of furniture for City Hall. *Id.* She made similar statements to the state attorney's office. *Id.* After she was terminated in retaliation, the employee sued under 42 U.S.C. § 1983, alleging violations of the First and Fourteenth Amendment. The Eleventh Circuit not only recognized her claim, but denied the defendant qualified immunity. *Id.* at 713. The court examined the content, form, and context of the testimony, and reasoned that:

> The content of Martinez' statements before the Board of Inquiry and to the State Attorney's office provided information concerning the expenditure of public funds in violation of City's Code of Ordinances. The form of her expression was testimony before the City's legislative body and statements to an investigator of the State Attorney's office. She made her statements in the context of an examination into the activities of City personnel by officials with authorized investigatory powers.

Id. at 712. The court explained that this speech, which enabled "members of society to make informed decisions about the operation of their government merits the highest degree of first amendment

protection." *Id.* (quotation marks and citation omitted). It noted that the employee's "expression clearly was made at a proper time, place and manner, and the context in which she made her statements *required* her to furnish information respecting City purchasing practices." *Id.* (emphasis in original). The court further held that these rules were "clearly established" at the relevant time, so that qualified immunity did not apply. *Id.* at 713. *Martinez* has never been overruled, and remains good law in the Eleventh Circuit.

The facts of *Martinez* align with this case. Like Ms. Martinez, petitioner was subpoenaed by a public investigative body (the grand jury), to testify about official malfeasance (Schmitz's fraud). Like Ms. Martinez, petitioner testified truthfully, and like Ms. Martinez, his testimony illuminated issues of public concern. Thus, it was not possible for a public official in the Eleventh Circuit to conclude that it was permissible, consistent with *Martinez*, to retaliate against petitioner. Indeed, petitioner's case is perhaps stronger than *Martinez* because in that case, the court did not comment on whether Ms. Martinez was expected to testify in her official capacity. But petitioner's responsibilities included no such obligation. Pet. App. 7a.

Similarly, in *Tindal v. Montgomery County Commission*, 32 F.3d 1535 (11th Cir. 1994), a public employee testified, under subpoena, in her coworkers' sexual harassment suit. The court held her speech protected, explaining that because it "took place in a public forum (a federal district court proceeding), not

in a private context," and because it "supported the discrimination and harassment claims of other individuals, not of [the witness] herself," the speech touched on a matter of public concern. *Id.* at 1540 (emphasis removed). As in *Martinez*, the court denied qualified immunity to the defendant. *See id.* at 1540-41.

To be sure, in the Eleventh Circuit, *Martinez* and *Tindal* do not stand for the proposition that subpoenaed testimony is *always* protected. However, they do establish that when, as here, a subpoenaed witness testifies in a public corruption proceeding, the testimony warrants protection. The Eleventh Circuit's subsequent cases do not undermine that conclusion.

The court below relied heavily on *Morris v. Crow*, 142 F.3d 1379, 1381 (11th Cir. 1998) (per curiam), a case in which a deputy sheriff prepared a report after another officer caused a death in a traffic accident. The reporting officer was then deposed in a civil wrongful death suit brought by the victim's family, where he "reiterated the conclusions regarding his observations of the accident." *Id.* at 1382. The court thus held that the report, which "discussed only his investigation and reconstruction of a single traffic accident," and "which was generated pursuant to [the employee's] official and customary duties as an accident investigator," was not entitled to protection. *Id.* It further held that the testimony was not entitled to protection because it could not "be characterized as an attempt to make public comment on sheriff's office policies and procedures, the internal workings of the

department, the quality of its employees or upon *any issue at all*." *Id.* at 1383 (emphasis added).

The *Morris* panel distinguished *Martinez*, reasoning that the speech in that case deserved protection because it "clearly affected matter of public concern where statements involved public funds spent in violation of city ordinance, were in the form of testimony before city's legislative body and statements to an investigator with state attorney's office, and were made in the context of an examination into activities of city personnel." *Id.*

Morris was wrongly decided at the time, and this Court's subsequent decision in *Garcetti* makes that clear: by emphasizing that citizen speech on matters of public concern is always protected, this Court rejected *Morris'* focus on the speaker's motivations, as opposed to the role in which he spoke. But whatever the merits of *Morris*, the facts of that case bear no resemblance to those here, and the *Morris* court's statements distinguishing *Martinez* equally distinguish this case. Unlike the officer in *Morris*, petitioner did not merely recite the contents of a typical report in a civil deposition held behind closed doors; he testified in a federal corruption prosecution—to a grand jury, and then in a public trial—during which he revealed that an elected official had abused her position of trust and defrauded the very people who had elected her to office. Thus, *Morris* would not have provided any support to a public official seeking to justify retaliation against petitioner.

Prior to petitioner's termination in 2009, the Eleventh Circuit had only denied protection for

testimony one other time—in an unpublished, non-precedential case that did not involve a subpoena or judicial proceedings. In *Green v. Barrett*, 226 F. App'x 883, 884 (11th Cir. 2007), the chief jailer of a prison testified at an emergency hearing after a prisoner attempted to escape. The purpose of the hearing was only to determine whether the prisoner had to be transferred to a maximum security prison, the jailer testified in her capacity as a jailer, and it is not clear that the hearing was even open to the public. *Id.* *Green* is therefore distinguishable from *Tindal*, from *Martinez* (which the *Green* court distinguished), and from this case.[12]

Importantly, neither *Morris* nor *Green* involved testimony to a grand jury or in a criminal trial. But the Eleventh Circuit had previously held that because "the public has a right to everyone's evidence, the citizen has a concomitant duty to appear and to testify before a grand jury when subpoenaed to do so; it is a basic obligation that every citizen owes his Government." *Grand Jury Proceedings (Williams) v.*

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[12] In the court of appeals, Franks relied heavily on *Abdur-Rahman v. Walker*, 567 F.3d 1278, 1286 (11th Cir. 2009), a case decided in May 2009, which denied First Amendment protection to sewer inspectors for reports to supervisors about water quality issues. That case is irrelevant to the qualified immunity analysis because it was decided after Franks acted. Moreover, like *Morris*, that case had nothing to do with testimony or corruption—and is therefore distinguishable. Finally, as explained on pages 31-34, *supra*, and by the dissent in *Abdur-Rahman* itself, 567 F.3d at 1289-91, that case plainly misread *Garcetti*.

United States, 995 F.2d 1013, 1016 (11th Cir. 1993) (internal quotation marks omitted). The court had also recognized that testimony at a hearing that is "open to the public," like the Schmitz trial, merits greater protection than speech at a private hearing. *See Maggio v. Sipple*, 211 F.3d 1346, 1353 (11th Cir. 2000). Thus, the most relevant Eleventh Circuit cases supported petitioner.

On-point cases from other circuits also put Franks on notice that it would be unlawful for him to terminate petitioner in retaliation for his testimony. By January 2009, the Third Circuit had decided *Reilly v. City of Atlantic City*, 532 F.3d 216 (3d Cir. 2008), and the Seventh Circuit had decided both *Morales v. Jones*, 494 F.3d 590 (7th Cir. 2007), and *Fairley v. Fermaint*, 482 F.3d 897 (7th Cir. 2007)—three post-*Garcetti* cases holding that the First Amendment protected subpoenaed testimony.

In *Reilly*, a police officer testified about corruption in his own department, relating the results of an internal investigation. 532 F.3d at 220. After suffering retaliation, he sued, and the defendants asserted qualified immunity. *Id.* at 219. The Third Circuit evaluated the defense in light of *Garcetti*, asking whether the officer "spoke as a citizen when he testified." *Id.* at 228. Reviewing this Court's decisions, the court of appeals reasoned that "[t]he notion that all citizens owe an independent duty to society to testify in court proceedings is . . . well-grounded in Supreme Court precedent." *Id.* at 229 (citing *Piemonte v. United States*, 367 U.S. 556, 559 n.2 (1961); *United States v. Mandujano*, 425 U.S. 564, 576

(1976); *United States v. Calandra*, 414 U.S. 338, 345 (1974); *New York v. O'Neill*, 359 U.S. 1, 11 (1959); *Blackmer v. United States*, 284 U.S. 421, 438 (1932); *Blair v. United States*, 250 U.S. 273, 281 (1919); *Branzburg v. Hayes*, 408 U.S. 665, 686 (1972); *United States v. Nixon*, 418 U.S. 683, 708 (1974)).

The Third Circuit also considered its own precedent, as well as that of other circuits, and determined that the "overwhelming weight of authority conclud[es] that an employee's truthful testimony in court is protected by the First Amendment." *Reilly*, 532 F.3d at 230 (citing *Pro v. Donatucci*, 81 F.3d 1283, 1290 (3d Cir. 1996); *Green v. Phila. Hous. Auth.*, 105 F.3d 882, 887 (3d Cir. 1997); *Herts v. Smith*, 345 F.3d 581, 586 (8th Cir. 2003); *Catletti ex rel. Estate of Catletti v. Rampe*, 334 F.3d 225, 229-30 (2d Cir. 2003); *Worrell v. Henry*, 219 F.3d 1197, 1204-05 (10th Cir. 2000); *Wright v. Ill. Dep't of Children & Family Servs.*, 40 F.3d 1492, 1505 (7th Cir. 1994); *Robinson v. Balog*, 160 F.3d 183, 189 (4th Cir.1998); and *Reeves v. Claiborne Cnty. Bd. of Educ.*, 828 F.2d 1096, 1100 (5th Cir. 1987), all of which held that the First Amendment protected public employees' truthful testimony).

Acknowledging that none of those cases was decided after *Garcetti*, the Third Circuit noted that only one precedential post-*Garcetti* decision had discussed First Amendment protection for a public employee's testimony: the Seventh Circuit's opinion in *Morales*, which held that a police officer's subpoenaed civil deposition testimony was protected because the testimony itself was not part of what the officer was

employed to do, "even though the officer testified about speech that was made pursuant to his official duties." *Reilly*, 532 F.3d at 230 (citing *Morales*, 494 F.3d at 598). Determining that the case before it was closer than *Morales* because Reilly had testified about an official investigation, the Third Circuit nevertheless held that "the act of offering truthful testimony is the responsibility of every citizen, and the First Amendment protection associated with fulfilling that duty of citizenship is not vitiated by one's status as a public employee." *Reilly*, 532 F.3d at 231. Moreover:

> When a government employee testifies truthfully, s/he is not "simply performing his or her job duties"; rather, the employee is acting as a citizen and is bound by the dictates of the court and the rules of evidence. Ensuring that truthful testimony is protected by the First Amendment promotes "the individual and societal interests" served when citizens play their vital role in the judicial process.

Id. (quoting *Garcetti*, 547 U.S. at 423).

At the time petitioner was terminated, *Reilly* was the most detailed, on-point case available. And this case is *a fortiori* from *Reilly*, because the police officer there frequently testified about his investigations, but petitioner's job did not require him to testify.

The Seventh Circuit's holding in *Morales* provided further persuasive authority establishing petitioner's rights. There, two police officers suffered retaliation after informing a prosecutor of allegations that the police chief and deputy chief had harbored the deputy chief's brother, who was wanted on felony warrants.

494 F.3d at 592. The officers' speech included conversations among themselves, a conversation with a state prosecutor, and subpoenaed statements in a civil deposition. *Id.* at 597. The officers sued, and the defendants argued that the officers' speech was not protected under *Garcetti* because it was pursuant to their duties. *Id.* at 595-96. The court held that the internal conversations and discussions with the prosecutor were not protected because they were part of a police investigation. *Id.* at 597. However, the court also held that the "deposition testimony [was] a different story" because "[b]eing deposed in a civil suit pursuant to a subpoena was unquestionably not one of Morales' job duties because it was not part of what he was employed to do." *Id.* at 598. Thus, even though the officer "testified *about* speech he made pursuant to his official duties," that fact did not "render[] his deposition unprotected." *Id.* (emphasis added).

The Seventh Circuit also addressed this issue briefly in *Fairley v. Fermaint*, 482 F.3d 897, 902 (7th Cir. 2007), a case in which two prison guards alleged that they had been retaliated against for standing up for inmates' rights, including by testifying on the inmates' behalf in civil suits. The court acknowledged that "[a]ssistance to prisoners and their lawyers in litigation is not part of a guard's official duties," and so the testimony would be protected under *Garcetti*. *Id.* It also explained that "[i]t was clearly established long before the events of which plaintiffs complain that state actors may not assault witnesses in federal litigation. That's a crime, *see* 18 U.S.C. § 1512(a)(2), so no public official could think the conduct proper." *Id.*

The facts of this case closely resemble those of *Morales*, and are *a fortiori* from *Reilly*. Here, as in *Morales*, petitioner's official duties did not include testifying in any court, and certainly did not include participating in federal law enforcement investigations.

In sum, the controlling precedents of this Court, the decisions of the Eleventh Circuit, and a consensus of persuasive authorities from other circuits all established petitioner's First Amendment right to testify in the Schmitz case. While it may be *possible* to cite *Morris v. Crow* as inspiration for the decision below—perhaps with a "*cf.*" signal—the persuasive value of that case is *de minimis* in light of the factual distinctions between that case and this one, not to mention this Court's decision in *Garcetti*, the Eleventh Circuit's prior controlling holding in *Martinez*, the Third Circuit's scholarly decision in *Reilly*, and the Seventh Circuit's decisions in *Morales* and *Fairley*. When the weight of contemporaneous precedent so strongly establishes a right, qualified immunity does not protect an official who violates it. No public official—whether in 2009 or today—could reasonably believe that it is permissible to retaliate against a federal witness in a corruption prosecution.

CONCLUSION

For the foregoing reasons, the judgment of the Eleventh Circuit should be reversed.

Respectfully submitted,

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RESPONDENT'S BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
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No. 13-483

In the
Supreme Court of the United States

EDWARD R. LANE,
Petitioner,
v.
STEVE FRANKS, IN HIS INDIVIDUAL CAPACITY, AND SUSAN BURROW, IN HER OFFICIAL CAPACITY AS ACTING PRESIDENT OF CENTRAL ALABAMA COMMUNITY COLLEGE,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

BRIEF FOR RESPONDENT SUSAN BURROW IN SUPPORT OF REVERSAL IN PART AND AFFIRMANCE IN PART

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March 3, 2014

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QUESTIONS PRESENTED

1. Is the government categorically free under the First Amendment to retaliate against a public employee for truthful sworn testimony that was compelled by subpoena and was not a part of the employee's ordinary job responsibilities?

2. Does qualified immunity preclude a claim for damages in such an action?

PARTIES TO THE PROCEEDINGS BELOW

Pursuant to Rule 14.1(b), the parties to the proceeding include the petitioner, the respondents, and the Central Alabama Community College, a defendant-appellee below.

While this case was pending in the Eleventh Circuit, Respondent Susan Burrow replaced Respondent Steve Franks as president of Central Alabama Community College when he retired.

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The opinion of the court of appeals is unpublished and reproduced at Pet. App. 1a-8a. The district court's memorandum opinion is unpublished and reproduced at Pet. App. 9a-35a.

JURISDICTION

The court of appeals issued its opinion on July 24, 2013. Pet. App. 1a. The petition was timely filed on October 15, 2013. 28 U.S.C. § 2101(c). This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION

The First Amendment to the United States Constitution provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

INTRODUCTION

The paramount question in this case is not what the result should be, but why. Society has compelling interests in the exposure of corruption and truthful in-court testimony, and those interests require First Amendment protection for the speech at issue here. But a *per se* rule treating all subpoenaed testimony as protected speech unjustifiably discounts the

government's interests in efficiency, consistent messaging, and control over official policy. In some circumstances, not present here, those countervailing policies will justify treating an employee's testimony as unprotected by the First Amendment. The right rule leaves room for both situations.

And the Court already has the right rule. Under *Garcetti v. Ceballos*, 547 U.S. 410 (2006), Petitioner Lane's testimony at a state senator's corruption trial was speech on a matter of public concern in his capacity as a citizen. The subject matter of Lane's speech—the legislator's no-show job—is plainly a matter of "public concern"; the associated scandal not only consumed the local press, but one reporter's work gained national attention and won a Pulitzer Prize. Lane's testimony at the legislator's first trial was just as plainly speech "as a citizen," not speech pursuant to his official duties; Lane testified again at the legislator's second trial, even though he was no longer a government worker and had no official duties by that time.

Because of *Garcetti*, this case neither requires nor warrants the adoption of a constitutional rule specific to witness testimony. The Court should reverse as to question one and affirm as to question two. Respondent Burrow confesses error on the first issue presented because this particular speech was protected, but she believes that Respondent Franks is nonetheless entitled to qualified immunity because of court-of-appeals precedent.

STATEMENT

Edward Lane worked for Alabama's two-year college system as a program director. He supervised a legislator who failed to do any work in return for the money she collected, he fired her for that reason, and he testified against her when she was investigated and charged with fraud. Lane alleges that he was fired in retaliation for giving this testimony, in violation of the First Amendment.

A. The press exposes widespread corruption in Alabama's two-year college system.

This case is an indirect byproduct of the pervasive corruption that infected Alabama's two-year community college system until the middle of last decade. It was then that a journalist with *The Birmingham News* won a Pulitzer Prize for reporting about the "cronyism and corruption" in the system. *See* The Pulitzer Prizes, *The 2007 Pulitzer Prize Winners: Investigative Reporting*, available at http://www.pulitzer.org/citation/2007-Investigative-Reporting (last visited Feb. 24, 2014).

Through those reports, the public learned that state officials had used their positions to benefit themselves and their associates with jobs and contracts. *See, e.g.*, Brett J. Blackledge, *Dozens of legislators paid by 2-year colleges*, BIRMINGHAM NEWS, Oct. 8, 2006, at 1 (2006 WLNR 17525572). For example, the chancellor of the two-year college system arranged to pay his children over $355,000 "for bogus Fire College jobs that didn't require work."

Brett J. Blackledge, *Ex-Fire College Chief Guilty*, BIRMINGHAM NEWS, Jun. 13, 2008, at 1 (2008 WLNR 11248080). At some colleges, state legislators were paid for work that they were already required to perform as elected officials. Brett J. Blackledge & Charles J. Dean, *Bishop, Shelton State Presidents to Retire*, BIRMINGHAM NEWS, Jun. 29, 2007, at 1 (2007 WLNR 12387946). The exposure of this "widespread" corruption was hailed by some as "the biggest political scandal in the history of Alabama." Tom Shelton, Letter to the Editor, BIRMINGHAM NEWS, Feb. 8, 2008, at 6 (2008 WLNR 2548333).

The State of Alabama took immediate steps to eradicate these problems. At the governor's urging, the state school board appointed a new chancellor of the two-year college system. Charles J. Dean, *Byrne Named Chancellor*, BIRMINGHAM NEWS, May 11, 2007 at 1 (2007 WLNR 10870436). The new chancellor proposed that the school board end the employment and contracting practices that had allowed corruption in the first place. *See* Thomas Spencer & Brett J. Blackledge, *Riley Expects Byrne's Proposal to Pass Board*, BIRMINGHAM NEWS, Aug. 22, 2007 at 1 (2007 WLNR 16405369). The Board voted to (1) end most flexible work schedules, (2) require any legislator-employee to obtain the chancellor's approval before using unpaid leave to attend legislative sessions, and (3) prohibit the two-year college system from employing legislators at all after 2010. *See Hill v. Galliher*, 65 So.3d 362, 363-65, 378 (Ala. 2010); *Byrne v. Galliher*, 39 So.3d 1049, 1050-52 (Ala. 2009). Eventually, the Alabama Legislature enacted comprehensive ethics laws in response to the

scandal. Among other things, it is now unlawful for a sitting legislator to be employed by the government in almost any other capacity, in the two-year college system or elsewhere. *See* ALA. CODE § 29-1-26.

The federal government also responded. A federal investigation of the two-year college system resulted in criminal charges against 18 people. Kent Faulk, *Two-year College Probe Follows Money*, BIRMINGHAM NEWS, Dec. 26, 2010, at 1 (2010 WLNR 25528096). The U.S. Attorney's Office obtained convictions in 17 of those cases and was awarded around $28 million in penalties. *Id.*

B. Lane begins working for CITY and fires Senator Schmitz.

Among those charged with crimes arising from the two-year college scandal was state senator Suzanne "Sue" Schmitz. Schmitz received money from the Community Intensive Treatment for Youth ("CITY") program, which operated under the supervision of Central Alabama Community College ("CACC"). Doc. 38, Exh. 2 at 171-72 & Exh. 4 at 1241-42, 1245. The CITY program provided academic and behavioral assistance to at-risk teens.

Lane began working as the director of CITY in 2006 and fired Schmitz about a month later. Before Lane's arrival, the former director elected to close the CITY programs in Montgomery and Mobile because the program had lost grant money. Doc. 38, Exh. 2 at 171-72 & Exh. 4 at 1243-44. In an effort to keep those locations open, Lane reviewed everything

about the program's spending, including Schmitz's position. Doc. 38, Exh. 2 at 172 & Exh. 4 at 1245.

During his general review, Lane learned that Schmitz was rarely at her office in Huntsville. Doc. 38, Exh. 2 at 176 & Exh. 4 at 1246. He contacted her to express his concerns and "validate her day-to-day activities" as a program employee. Doc. 38, Exh. 2 at 178. But he could not find her contract or any timesheets reporting her time worked. Doc. 38, Exh. 2 at 178. At one point, when Lane pressed Schmitz about going to work, she informed him that she got her job through Paul Hubbert, an officer of the Alabama Education Association. Doc. 38, Exh. 2 at 179 & Exh. 4 at 1247. After that conversation, one of Lane's supervisors warned him to be careful. Doc. 38, Exh. 4 at 1248. Schmitz also threatened to call Hubbert during a later conversation about her failure to report to work. Doc. 38, Exh. 2 at 183-84 & Exh. 4 at 1250.

Eventually, Lane told Schmitz to report daily to the CITY office in Huntsville, where she could work as a counselor. Doc. 38, Exh. 2 at 180 & Exh. 4 at 1250. He explained that he "needed her to start reporting to an office and start working from 8:00 to 4:30 on a day-to-day basis." Doc. 38, Exh. 2 at 183. Lane sent a letter, dated October 4, 2006, confirming his instructions. Doc. 38, Exh. 4 at 1251. The next day, Schmitz responded by letter that she wished to "continue to serve the CITY Program in the same manner as I have in the past." Doc. 38, Exh. 2 at 187 & Exh. 4 at 1252-53. But Lane "did not see any work product that she had provided" in the past. Doc. 38, Exh. 2 at 187 & Exh. 4 at 1253. So, later that month,

Lane informed Schmitz in person and by letter that he would "not offer [her] a contract for fiscal year 2007." Doc. 35, Exh. E Attach. 2. She appealed her dismissal, and she was ordered reinstated by an administrative law judge and state trial court, although those orders were stayed pending her criminal trial. *See Central Ala. Cmty. Coll., et al. v. Robinson, et al.*, 53 So. 3d 917, 918, 919 n.2 (Ala. Civ. App. 2009).

C. Schmitz is indicted for collecting paychecks from her no-show job.

In November 2006, Lane testified before a federal grand jury that Schmitz failed to perform any work as a CITY employee and was fired because of it. *See* Doc. 38, Exh. 2 at 202.

Federal prosecutors eventually charged Schmitz with mail fraud and theft of money from a program involving federal funds, based on her acceptance of over $175,000 from the CITY program. Brett J. Blackledge, *Schmitz Arrested in College Probe*, BIRMINGHAM NEWS, Feb. 1, 2008, at 1 (2008 WLNR 2169247). The indictment alleged that her scheme to defraud involved taking a salary and other benefits from CITY, even though she performed little or no work for the program, generated virtually no services or work product, and rarely appeared at the program's offices. *See United States v. Schmitz*, 634 F.3d 1247, 1256-57 (11th Cir. 2011). Federal prosecutors also alleged that, in furtherance of her scheme, Schmitz prepared and submitted fraudulent

statements about the number of hours she worked and the nature of her services. *Id.*

Like everything else having to do with the two-year college corruption scandal, the press covered the charges against Schmitz. *See* Editorial, *Justice for All*, BIRMINGHAM NEWS, May 31, 2008, at 6 (2008 WLNR 10471538); Editorial, *Truth will Prevail*, DOTHAN EAGLE, Aug. 20, 2008 (2008 WLNR 15695294); N. Anne Scott, Editorial, *Impudent Protest*, HUNTSVILLE TIMES, May 22, 2008, at 6A (2008 WLNR 10186741). And, once Schmitz's trial began, the case against her continued to be the subject of intense public interest. *See, e.g.*, Editorial, *Getting to the Bottom of Things*, THE ANNISTON STAR, Aug. 21, 2008 (2008 WLNR 15767135).

In August 2008, Lane testified at Schmitz's first federal criminal trial. Doc. 38, Exh. 2 at 170-203. The trial ended with a hung jury and a mistrial. *See* Kim Chandler, *Schmitz case called mistrial*, BIRMINGHAM NEWS, Sept. 9, 2008, at 1 (2008 WLNR 17167314).

D. Lane is dismissed, Schmitz is convicted, and the CITY program is discontinued.

At the time of Schmitz's employment and first trial, CACC oversaw the CITY program. Steven Franks became the president of CACC in the fall of 2007. *See* Doc. 35, Exh. B at 27. He was hired after the new chancellor began his reforms of the two-year college system and nearly a year after Lane fired Schmitz.

In the fall of 2008, Lane and Franks discussed the need for layoffs to solve continuing budget shortfalls in the CITY program. Doc. 35, Exh. B at 63-65. In January 2009, before Schmitz was retried, Franks terminated the employment of all probationary CITY employees without tenure, including Lane. Doc. 35, Exh. B at 65-66. Franks later realized that most of CITY's employees were protected from layoffs by civil service laws. Doc. 35, Exh. B at 69-70. He then rescinded his termination of all the employees except Lane and one other person, both of whom Franks believed were not covered by civil service laws because they had not been employed long enough. Doc. 35, Exh. B at 84-85.

About a month after his dismissal from CITY, Lane testified at Schmitz's second trial. Doc. 38, Exh. 4 at 1193, 1241-69. This time, the jury found Schmitz guilty. The Eleventh Circuit later affirmed her convictions for mail fraud in an opinion that relied extensively on Lane's testimony. *Schmitz*, 634 F.3d at 1254-55, 1257, 1266.

Unfortunately, the budget problems that had plagued the CITY program since Lane's arrival in 20[illegible]uld not be resolved. In September 2009, the CITY program was dissolved, and its funding was reallocated elsewhere. Doc. 35, Exh. B at 21-22.

Franks recently retired. Susan Burrow replaced him while this case was pending before the Eleventh Circuit, and she is the acting president of CACC.

E. Lane files a lawsuit challenging his dismissal.

Lane sued the community college and Franks in federal court, alleging, among other things, that his employment was wrongfully terminated because he testified at Schmitz's first trial.

The district court granted the defendants summary judgment based on sovereign and qualified immunity. Pet. App. 9a-10a. Because Lane's testimony relayed information that he learned "while performing in his official capacity as Director at C.I.T.Y.," the court concluded that his speech at the trial was "not made as a citizen on a matter of public concern." Pet. App. 29a. The court also concluded that the Eleventh Circuit's decisions did "not create a clear and binding precedent so well-established that Dr. Franks should have known that he was violating Mr. Lane's Constitutional rights by terminating him, if he terminated him because of his testimony in Ms. Schmitz's criminal trial." Pet. App. 33a.

The Eleventh Circuit affirmed in an unpublished opinion, holding that "Lane has failed to establish a *prima facie* case of retaliation." Pet. App. 1a-8a. The court noted its precedent that a public employee "enjoys no First Amendment protection if his speech owes its existence to [his] professional responsibilities and is a product that the employer itself has commissioned or created." Pet. App. 5a (internal quotation marks omitted). The Eleventh Circuit held that Lane "was acting pursuant to his official duties as CITY's director" when he investigated Schmitz and terminated her

employment. Pet. App. 7a. It reasoned that the fact "[t]hat Lane testified about his official activities pursuant to a subpoena and in the litigation context, in and of itself, does not bring Lane's speech within the protection of the First Amendment." Pet. App. 7a. Acknowledging that "[o]ther circuits seem to have decided this issue differently," the Eleventh Circuit concluded that, under its precedent, "the record fails to establish that Lane testified as a citizen on a matter of public concern: as a matter of law, he cannot state a claim for retaliation under the First Amendment." Pet. App. 7a n.3, 8a.

SUMMARY OF ARGUMENT

The Court should reverse on the first question and affirm on the second.

I. The Court should reverse on the first question presented and remand to the court of appeals to rule on Lane's claims against Burrow in her official capacity. On remand, the court of appeals should evaluate other grounds upon which to affirm the district court and apply the balancing test under *Pickering v. Board of Education*, 391 U.S. 563 (1968).

A. The First Amendment protects the speech at issue in this case. In *Garcetti v. Ceballos*, 547 U.S. 410 (2006), the Court established a fact- and context-sensitive test for determining whether a public employee's speech is "pursuant to" his or her "official duties." The Court explained that speech that "owes its existence" to an employee's duties is unprotected by the First Amendment. The Court instructed lower courts to undertake a "practical inquiry" to

determine whether an employee's speech is "pursuant to his official duties," evaluating all the circumstances surrounding the employee's speech.

A faithful application of *Garcetti* compels reversal on these facts. Although Lane's testimony concerned his employment, that fact is not dispositive. Instead, the key question is whether the government, at least in part, paid for the speech at issue. Here, the government did not pay Lane to speak, had no official position that required consistent messaging, and had no reasonable expectation that it could influence his testimony. Moreover, the subject matter of Lane's speech—a legislator's corrupt no-show job—was plainly a matter of public concern. The scandal and trial consumed the news. Although Lane may not have *intended* his speech as a comment on a matter of public concern, that was the import of his testimony nonetheless.

B. Because this case can be resolved by a straightforward application of *Garcetti*, it is neither necessary nor advisable to adopt a *per se* rule that treats all subpoenaed testimony as speech "by a citizen" on a "matter of public concern." The Third, Fifth, and Seventh Circuits were wrong to adopt such a *per se* rule for the following reasons.

First, common sense dictates that, sometimes, government employees are speaking pursuant to their official duties even when they have been subpoenaed. Police officers, lab technicians, and others routinely testify as a part of their official duties. Other employees must support an official position or message as a part of their official duties, and this is no less true for those officials merely

because they are in court. For example, a witness testifying pursuant to a subpoena issued under Rule 30(b)(6) of the Rules of Civil Procedure is literally testifying on behalf of her employer. This speech should be treated the same as speech outside of court.

Second, there are times when an employee may testify about matters that are of purely private concern, despite their relevance to a judicial proceeding. This Court's jurisprudence under the Petition Clause recognizes that speech is not protected merely because it occurs in the context of a judicial proceeding. A rule that protects all speech within a judicial proceeding under the Free Speech Clause would treat the same speech differently, depending on the clause a government employee invokes.

C. Finally, if the Court finds that the speech at issue was outside of Lane's official duties and on a matter of public concern, it should remand for *Pickering* balancing. The lower court did not address the balancing of interests under *Pickering* and, at the time of Lane's dismissal, the state legislator on trial had successfully appealed her termination. The court of appeals should consider these and the other issues that may ultimately lead to affirmance in the first instance.

II. The Court should affirm on the second question presented because Franks has qualified immunity from damages in his individual capacity.

A. At the time Lane was dismissed, the Eleventh Circuit had already adopted a broad reading of "official duties." The Eleventh Circuit had also

applied that broad reading to hold that the government may terminate an employee because of his testimony about something he learned during his employment. The Eleventh Circuit reasoned that the testimony was unprotected, regardless of the fact that it was compelled by a subpoena.

B. Qualified immunity should protect government officers whose actions are consistent with court-of-appeals case law. This rule will allow lower courts to quickly and expeditiously resolve claims of qualified immunity. This rule serves the interests of qualified immunity by protecting officials who act in good faith. And this rule is consistent with the principle that lower courts must follow precedents until they are directly overruled by a higher court, regardless of intervening cases or circumstances.

ARGUMENT

I. The First Amendment protects some speech compelled by a subpoena on a matter of public concern, including the testimony at issue here.

The answer to the first question presented is "no." A government is not "categorically free" under the First Amendment to fire an employee because the employee testified at a criminal trial about an elected official's corruption. Respondent Burrow, in her official capacity, represented by the Attorney General of Alabama as an officer of the State, concedes that the lower court got this case wrong by holding that Lane's speech was entirely unprotected.

Although Lane's testimony concerned facts that he learned by way of his employment, he was testifying as a citizen on a matter of public concern. Lane's speech is entitled to protection under the First Amendment, and his termination is subject to judicial scrutiny.[1]

In deciding the question presented, however, this Court need not create a *per se* rule or a new constitutional framework. The Court need only correct the court of appeals' unreasonably broad conception of "official duties" and apply the context-sensitive test outlined in *Garcetti v. Ceballos*, 547 U.S. 410 (2006). Moreover, Respondent Burrow does not concede that Lane's claim for reinstatement should ultimately succeed on remand. Instead, there are a number of reasons why his claim should be rejected, the least of which is Lane's failure to show that his testimony had anything to do with his dismissal.[2]

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[1] Like the lower courts, this brief assumes without deciding that compelled testimony under oath is "speech." *Cf. United States v. Alvarez*, 132 S. Ct. 2537, 2546 (2012) (assuming that "testimony under oath" is a kind of "speech" that is entitled to First Amendment protection if truthful).

[2] Lane's official-capacity claim fails as a matter of law for at least the following reasons: (1) Lane failed to show any connection between his testimony and his dismissal, (2) sovereign immunity prohibits the remedy of reinstatement, and (3) there is no position to which the President of the CACC can reinstate Lane because the CITY program was dissolved. These issues were raised in the court of appeals and can be litigated there on remand.

A. The court of appeals erred under this Court's existing precedents by defining "official duties" in a way that unduly restricts speech.

The Court should hold that, on the facts of this case, Lane's testimony was speech by a citizen about a matter of public concern. The lower court's approach uniquely restricts the freedom of speech by defining "official duties" too broadly and "public concern" too narrowly. But there is no need to create new law. The Court should reverse and vacate by applying the context-sensitive and fact-dependent test from *Garcetti*.

1. This Court's case law balances "the interests of the [employee], as a citizen, in commenting upon matters of public concern" with "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 568 (1968). The critical threshold question is whether the statement about a public issue is one "an employee makes pursuant to his or her official responsibilities" or instead a statement made by the employee "as a citizen" and "outside the duties of employment." *Garcetti*, 547 U.S. at 423-24. "So long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively." *Id.* at 419.

These questions are fact-intensive inquiries that cannot be reduced to bright-line rules. Whether a

statement is part of an employee's official duties is necessarily "a practical" inquiry that does not turn on "formal job descriptions." *Id.* at 424. The same words that are unprotected when made in the course of one's official duties may nonetheless be protected when repeated during the "kind of activity engaged in by citizens who do not work for the government." *Id.* at 423. *See also id.* at 430 n.1 (Souter, J., dissenting) (emphasizing "the majority's concession of some First Amendment protection when a public employee repeats statements made pursuant to his duties but in a separate, public forum"). Courts also must evaluate the "content, form, and context" of speech, "as revealed by the whole record," in order to determine whether it relates to a matter of "public concern." *Connick v. Myers*, 461 U.S. 138, 147-48 (1983).

2. The court of appeals refused to engage in the "practical" analysis compelled by *Garcetti*. Instead, the court of appeals held that a government employee's testimony is not protected if the employee recounts facts that he learned on the job. A faithful application of this Court's existing case law establishes that the court of appeals erred.

First, the best reading of this Court's precedents is that Lane's speech was not made "pursuant to [his] official duties." *Garcetti*, 547 U.S. at 421. The court of appeals concluded that Lane's speech was unprotected because it "owed its existence" to his official duties and "touched only on acts he performed as part of his official duties." Pet. App. 5a, 7a. In other words, the lower court held that the First Amendment does not protect speech if that

speech would not have taken place *but for* an employee's job.

The court of appeals reached this result by misinterpreting *Garcetti*. In *Garcetti*, the Court addressed a situation in which the employee's "duties sometimes required him to speak or write," and it was *this* speech that the employee argued was protected. *Garcetti*, 547 U.S. at 421-22. In other words, the speech at issue was "part of what [the employee] was employed to do." *Id.* at 421. The Court rejected the argument that such speech was protected and expressly "h[e]ld" that an employee's speech is unprotected if made "pursuant to [his] official duties." *Id.* In explaining its express holding, the Court also reasoned that "restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen." *Id.* at 421-22.

The Court did not use the phrase "owes its existence" in the *causal* sense. The Court had already explained that the mere fact that an employee's speech "concern[s] the subject matter of [his] employment . . . is nondispositive." *Id.* at 421. And the plaintiffs in both *Pickering* and *Connick* were disciplined for sharing information learned and opinions formed in the course of their public employment. A "but-for" rule would leave all such employee speech unprotected, even though *Pickering* and *Connick* held otherwise. *See Connick*, 461 U.S. at 149, 154; *Pickering*, 391 U.S. 570-72.

Instead, the speech in *Garcetti* "owed its existence" to the employee's job in the *pecuniary*

sense. The employee was paid to produce the speech. The right question, therefore, is not whether the employee's speech is somehow related to the employee's job. The right question is whether the employee is being paid, at least in part, for the purpose of providing the speech. *See* 547 U.S. at 437 ("When the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes.") (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995)).

Under a proper formulation of the rule, Lane's speech was not made "pursuant to his official duties." Lane's testimony was not an "official communication" for which there was a "need for substantive consistency and clarity." *Garcetti*, 547 U.S. at 422. The State did not pay Lane for speaking at the legislator's grand jury proceedings or her first public corruption trial, which ended in a mistrial. *See Morales v. Jones*, 494 F.3d 590, 598 (7th Cir. 2007) (testimony not part of employee's "job duties because it was not part of what he was employed to do"). Indeed, Lane gave the same testimony at the second trial, when he was no longer employed as CITY's director. Nor did the State have any legitimate expectation that it could control Lane's testimony. Lane's testimony was no different than what a private citizen could have said, had the private citizen known the relevant facts about the state legislator who was on trial.

Second, although the "boundaries of the public concern test are not well defined," *City of San Diego v. Roe*, 543 U.S. 77, 83 (2004) (per curiam), there can be little meaningful dispute that Lane's speech was

on a "matter of public concern." An employee's speech is on a matter of public concern "when it can be fairly considered as relating to any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest." *Snyder v. Phelps*, 131 S. Ct. 1207, 1216 (2011) (internal citations and quotation marks omitted). Lane testified about his correspondence with and dismissal of a state senator who used her influence to gain a state-funded no-show job. *See Garcetti*, 547 U.S. at 425 ("Exposing governmental inefficiency and misconduct is a matter of considerable significance."). Lane's testimony was, apparently, integral to exposing and proving this corrupt scheme and to Schmitz's eventual conviction at her retrial. *See Schmitz*, 634 F.3d at 1254-55, 1257, 1266. The trial and associated scandal were the subjects of widespread news coverage and public debate. *See supra* at 3-5, 7-8.

The court of appeals intimated that Lane's speech was not on a matter of "public concern" because "nothing evidences that . . . his testimony was an attempt to comment publicly on CITY's internal operations." Pet. App. 8a. But that reasoning is unpersuasive. Factual statements, no less than opinions, are protected under the First Amendment. *See Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 61-62 (2006); *Zauderer v. Office of Disciplinary Council of Supreme Court of Ohio*, 471 U.S. 626, 640 n.9 (1985); *In re R.M.J.*, 455 U.S. 191, 203 (1982). And the speech here looks nothing like the kinds of speech that this Court has held to be of "private concern." *Compare*

Roe, 543 U.S. at 78 (lewd and pornographic video); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 762 (1985) (personal credit report that "was made available to only five subscribers"); *Connick*, 461 U.S. at 148 (correspondence reflecting that "a single employee [wa]s upset with the status quo" because she was "transfer[red] to another section").

Moreover, whether or not Lane personally *wanted* to "comment publicly," that was what he did when he testified at the legislator's first trial. That Lane spoke at a judicial proceeding is not dispositive. But it strengthens the commonsense conclusion that Lane's speech in this case was on a matter of public concern. *See, e.g., United States v. Euge*, 444 U.S. 707, 713 (1980) (discussing society's important interest in truthful testimony); *United States v. Calandra*, 414 U.S. 338, 345 (1974) (same).

On the facts of this case, the Court should reverse. Lane's testimony was plainly a comment on a matter of public concern. And he was just as plainly speaking "as a citizen" because the State did not pay for his speech or have any reasonable expectation that it could influence his message.

B. The Court should not hold that *all* testimony is citizen speech on a matter of public concern.

In reversing, the Court should not adopt a *per se* rule that any subpoenaed testimony by a governemnt employee is speech on a matter of "public concern" "as a citizen." *See Chrzanowski v. Bianchi*, 725 F.3d

734, 741 (7th Cir. 2013) (*per se* rule that "[w]hen a public employee gives testimony pursuant to a subpoena . . . he speaks 'as a citizen' for First Amendment purposes"); *Reilly v. City of Atlantic City*, 532 F.3d 216, 231 (3d Cir. 2008) (same). *See also Johnston v. Harris Cnty. Flood Control Dist.*, 869 F.2d 1565, 1578 (5th Cir. 1989) (all testimony is on matter of public concern). Such a rule is unnecessary for the reasons explained above, and it is inappropriate in any event.[3] Certain government employees are expected to testify or otherwise communicate an official position as part of their job duties. Courts should conduct the same "practical" analysis with respect to testimony as they use with other kinds of employee speech.

1. As a citizen/official duties. Some circuits have held that all speech that is compelled by a subpoena is necessarily speech "as a citizen." *See Chrzanowski*, 725 F.3d at 741; *Reilly*, 532 F.3d at 231. *See also*

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[3] The Second, Eighth, Ninth, and Tenth Circuits have rejected a *per se* rule. *See Clairmont v. Sound Mental Health*, 632 F.3d 1091, 1103-05 (9th Cir. 2011) (declining to adopt a *per se* rule that "truthful testimony given pursuant to a subpoena" is "a matter of public concern"); *Deutsch v. Jordan*, 618 F.3d 1093, 1099 n.1 (10th Cir. 2010) (declining to "enter the debate" about whether testimony is inherently a matter of public concern); *Catletti ex rel estate of Catletti v. Rampe*, 334 F.3d 225, 230 (2d Cir. 2003) (declining to adopt a *per se* rule); *Padilla v. S. Harrison R-II Sch. Dist.*, 181 F.3d 992, 996-97 (8th Cir. 1997) (holding that the "compelled expression" of a teacher's opinion about the propriety of sexual relationships between teachers and minors was not entitled to First Amendment protection because it was unrelated to "legitimate disagreement" with school policy and not about a matter of public concern).

Matt Wolfe, Comment, *Does the First Amendment Protect Testimony by Public Employees?*, 77 U. CHI. L. REV. 1473, 1482-1490 (2010) (collecting cases). This rule proves too much.

Employees who speak "pursuant to their official duties" are not "speaking as citizens" because the government is paying for their speech. *Garcetti*, 547 U.S. at 421. Speech made in an employee's "professional capacity" has "official consequences," and employers have "heightened interests" in ensuring that such speech is "accurate, demonstrate[s] sound judgment, and promote[s] the employer's mission." *Id.* at 422-23. Thus, if an employee speaks because of his "job duties," that speech is unprotected and not subject to the "delicate balancing" required by the First Amendment. *Id.* at 423.

These principles are just as relevant when an employee testifies in court. For some employees, testifying is a routine part of their official duties, and an employer naturally has an interest in the supervision or oversight of that testimony. For example, police officers routinely testify about traffic stops, arrests, or investigations; crime scene technicians testify about processing evidence; and laboratory technicians testify about analyzing substances to confirm the presence of illegal drugs. If a testifying police officer's credibility were questionable, or if he made other mistakes, the mere fact that he was testifying could "not mean his supervisors [a]re prohibited from evaluating his performance." *Id.* at 422. The Constitution allows the

police department to reassign, demote, or fire him because of his testimony.

Similarly, other employees may reasonably be expected to communicate or promote their employer's official position during their testimony, even if testifying is not a routine part of their job. A witness subpoenaed under Rule 30(b)(6) of the Rules of Civil Procedure is literally testifying on behalf of his or her employer. *See* FED. R. CIV. P. 30(b)(6) (providing for deposition notice or subpoena directed to an organization). Likewise, other witnesses are—as a practical matter—testifying as their employer's representatives in the context of the litigation. *See Green v. Barrett*, 226 F. App'x. 883 (11th Cir. 2007) (chief jailer fired because she testified in litigation over safety of jails that she believed her jail was not safe). A governor's chief of staff, the warden of a prison, the head of a state agency; to the extent these employees cannot promote the government's official position, in court or elsewhere, the government is warranted in replacing them with someone who can.

Although these government employees face perjury charges or contempt proceedings like other citizens if they fail to testify truthfully, they also—rightly—face employment consequences if they testify poorly or undermine the government's official position. The governments employing such persons have "an adequate justification for treating the employee[s] differently from any other member of the general public" because of reasonable expectations arising from their official duties. *See Garcetti*, 547 U.S. at 418. Like private employers, government employers must ensure that their employees testify

accurately, demonstrate sound judgment, and promote the employer's mission. *See id.* at 422-23.

2. Public concern. Lane has argued "that messages delivered by a subpoenaed witness to a federal court relate *ipso facto* to matters of public concern, *i.e.*, to society's interest in knowing the truth and upholding the law." Pet. 21. Once again, as the Second, Eighth, Ninth, and Tenth Circuits have recognized, this *per se* rule proves too much. *See Clairmont*, 632 F.3d at 1103-05; *Deutsch*, 618 F.3d at 1099 n.1; *Catletti*, 334 F.3d at 230; *Padilla*, 181 F.3d at 996-97. Courts must evaluate the content of the speech, in addition to the forum, to determine whether the speech relates to a matter of public concern. *See, e.g., Snyder*, 131 S. Ct. at 1216.

Society's generalized interest in truthful testimony does not convert all such testimony into speech on a matter of public concern. A witness's testimony, at least in part, may concern purely private matters or disputes. Witnesses may express their opinions, speculate, testify about extraneous matters, and otherwise exceed the scope of the societal expectation that they merely testify truthfully. A government employee should not be allowed to avoid the repercussions of commenting on another person's purely private affairs or "mask an attack . . . over a private matter" by testifying in a judicial proceeding. *Id.* at 1217. A government employee should be subject to sanction for speech on purely private matters, even if that speech comes in the form of testimony.

A bright-line rule that privileges the speech of all government employee testimony would also create

substantial tension with the Court's treatment of the Petition Clause. In *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488 (2011), the Court held that the Petition Clause prohibits the firing of a government employee based on a grievance or lawsuit against his employer *only* if that grievance or lawsuit involves a matter of "public concern." *Id.* at 2497. The Court noted that a private grievance that "takes the form of a lawsuit against the government employer . . . may be particularly disruptive." *Id.* at 2496. If the Constitution were to protect employees from retaliation based on their private grievances, a public employee could "use the courts to pursue personal vendettas or to harass members of the general public" and thereby "cause a serious breakdown in public confidence in the government and its employees." *Id.*

These same concerns warrant a case-by-case evaluation of employee testimony to determine whether it is on a matter of "public concern." "A different rule for [Free Speech and Petition claims] would require employers to separate petitions from other speech in order to afford them different treatment; and that, in turn, would add to the complexity and expense of compliance with the Constitution." *Id.* at 2497. Different rules would also "provide a ready means for public employees to circumvent the test's protections" for government employers by casting their claim as one about testimony in a lawsuit as opposed to the filing of the lawsuit itself. *Id.* Employee speech during the course of a lawsuit should be evaluated the same—whether

the government employee files the suit, testifies, or both.

C. The court of appeals should apply the *Pickering* balancing test on remand.

The inquiry does not stop when a court determines that an employee is speaking as a citizen on an issue of public concern. Because government employers "need a significant degree of control over their employees' words and actions" in order to provide public services, the government may impose "speech restrictions that are necessary" for the governmental employer "to operate efficiently and effectively," even when employees speak "as citizens about matters of public concern." *Garcetti*, 547 U.S. at 418-19. If the Court reverses, it should remand to the court of appeals to perform the *Pickering* balancing test and consider the various other grounds that undermine Lane's claim.

1. Even where an employee speaks as a citizen on an issue of public concern, the Court must balance the employer's interest in efficiency and other legitimate policies with the employee's interest in speaking. Because the First Amendment's protections are not absolute, the *Pickering* Court adopted a balancing test that requires "a court evaluating restraints on a public employee's speech to balance the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Roe*, 543 U.S. at 82

(alteration in original) (internal quotation marks omitted). This balancing requires the Court to consider, for example, whether an employee's speech was likely to "distract co-workers and supervisors from their tasks at hand" or "thwart the implementation of legitimate policy." *Garcetti*, 547 U.S. at 429 (Souter, J., dissenting).

2. The lower courts have given exceedingly short shrift to the *Pickering* balancing test when addressing employee testimony. *See Chrzanowski*, 725 F.3d at 741-42 (finding a First Amendment violation without balancing); *Reilly*, 532 F.3d at 231 (same). This Court should expressly recognize that a government's interests will sometimes (if rarely) justify employment repercussions where an employee testifies as a citizen on a matter of public concern.

Some statements can so "impede[] the [employee's] proper performance of his daily duties" that the government may take employment action even though the statements are constitutionally protected. *Pickering*, 391 U.S. at 572. For example, a police department has a strong interest in ensuring that its employees can work together, sometimes in life or death situations. If two police officers can no longer work together because one has testified against the other, the department must be free to reassign, demote, or fire them. This is so even if the officer's testimony was on a matter of public concern.

Similarly, the *Pickering* balancing test allows the government to take adverse action against employees who demonstrate unfitness through testimony as a citizen on a matter of public concern. An employee's speech will sometimes reveal "evidence of the

[employee's] general competence, or lack thereof." *Id.* at 573 n.5. Sometimes a witness's words reflect poor judgment that can destroy the trust necessary for workplace relationships. Likewise, if an employee's testimony reveals that he misused state resources, took drugs at work, or engaged in other inappropriate behavior, his employer should be able to fire him because of that behavior, revealed through his testimony. The First Amendment is not the Fifth Amendment; it does not protect against revealing information detrimental to one's government employment.

The universe of cases where a government's interest justifies taking action based on an employee's testimony as a public citizen is admittedly small. In most cases, the government's interest in overseeing employee testimony is not as significant as the employee's interest in testifying, or, indeed, as significant as the government's own interest in whistle-blower testimony. But courts cannot simply disregard the *Pickering* balancing test when testimony is at issue. *See, e.g., Worrell v. Henry*, 219 F.3d 1197, 1205 (10th Cir. 2000) (noting that "constitutional protection" for "the truthful testimony of public employees protects both employees' interest in free expression and the judicial system's interest in arriving at the truth" but "is not absolute").

3. At the time Lane was dismissed, Schmitz had successfully appealed her termination and temporarily defeated the federal government's public corruption charges. Just as it sidestepped the other issues that may ultimately doom Lane's retaliation

claim, *see supra* note 2, the court of appeals did not address the *Pickering* balancing test. The proper application of *Pickering* is also outside the questions presented. If this Court reverses, it should allow the lower courts to perform the *Pickering* balancing test in the first instance.

II. Respondent Franks has qualified immunity from a suit for damages.

The answer to question two is "yes," at least in this case. Although Lane spoke as a citizen on a matter of public concern, qualified immunity protects Franks from liability. "Qualified immunity shields federal and state officials from money damages unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct." *Ashcroft v. Al-Kidd*, 131 S. Ct. 2074, 2080 (2011) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). A right is "clearly established" if "the contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right" because "in the light of pre-existing law the unlawfulness [of his action is] apparent." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

It was not "clearly established," when Franks fired Lane, that the First Amendment protected a government employee's testimony about work-related matters. At the time of Lane's dismissal, Franks's home circuit had already rejected a First Amendment claim based on subpoenaed testimony

about an employee's work activities. Even if that circuit-level precedent was wrongly decided, *see supra* at 14-21, the defense of qualified immunity does not require state officers to forecast the evolution of federal law.

A. The Eleventh Circuit had authorized the firing of a government employee because of testimony about his employment.

This case is unique in that Franks's home circuit had created a practically categorical rule that sanctioned as constitutional the very unconstitutional act that Franks is alleged to have committed. In the usual case, the question of qualified immunity arises against the backdrop of unclear and contradictory circuit precedent. *See Pearson v. Callahan*, 555 U.S. 223, 244 (2009) (noting that the officers' "own Federal Circuit had not yet ruled" at the time of their conduct). Even so, public "officers are entitled to rely on existing lower court cases without facing personal liability for their actions." *Id.* at 244-45. The court-of-appeals precedent that governed Franks supported the termination of a government employee because of that employee's testimony.

1. The qualified-immunity analysis begins with *Morris v. Crow*, 142 F.3d 1379 (11th Cir. 1998). In *Morris*, the Eleventh Circuit declined to give First Amendment protection to a police officer's speech about his investigation of a fatal car accident involving another officer, which included the officer's subpoenaed deposition testimony in a wrongful death

case against the sheriff's department. 142 F.3d at 1381-85. Specifically, the police officer testified "that another sheriff's deputy violated office policy in responding to an emergency, resulting in the death of a citizen." *Id.* at 1381. He "additionally stated that if the officer [had been] traveling the legal speed limit, there was a 'great possibility' the accident would not have occurred." *Id.*

The Eleventh Circuit held that the officer did not speak "as a citizen" on a matter of "public concern." *Id.* at 1382-83. First, the Court noted that the officer's deposition testimony concerned a report that was "generated pursuant to his official and customary duties." *Id.* at 1382. Then the Court reasoned that, because the officer's testimony merely "reiterated the conclusions regarding his observations of the accident," it did not matter that his "statements were made in the context of a civil deposition." *Id.* at 1382-83. Instead, the court of appeals reasoned that the officer's testimony was unprotected speech, in part, because he had no control over it. The officer's testimony was akin to his accident report in that it was not "voluntar[y]" but made "in compliance with a subpoena to testify truthfully." *Id.*

2. Although the facts of *Morris* are distinguishable from the facts in this case, the rule established by *Morris* was that involuntary testimony about an employee's job is generally unprotected by the First Amendment. The court of appeals continued to apply *Morris* and its broad "official duties" analysis after *Garcetti*. *See Green*, 226 F. App'x. at 866-87. And the Eleventh Circuit

extended this broad conception of "official duties" beyond the context of subpoenaed testimony. *See Boyce v. Andrew*, 510 F.3d 1333, 1341-47 (11th Cir. 2007); *Phillips v. City of Dawsonville*, 499 F.3d 1239, 1241-43 (11th Cir. 2007); *D'Angelo v. School Bd. of Polk Cnty., Fla.*, 497 F.3d 1203, 1208-11 (11th Cir. 2007); *Vila v. Padron*, 484 F.3d 1334, 1339-40 (11th Cir. 2007); *Battle v. Bd. of Regents for Ga.*, 468 F.3d 755, 760-62 (11th Cir. 2006).

This body of circuit precedent was the law in the Eleventh Circuit when Franks terminated Lane, and it arguably dictated the result in this case. *See* Pet. App. 7a n.3. ("*Morris* is the law in this Circuit on the question of public employee speech per a subpoena in the context of judicial proceedings."). As Lane explained in his petition for certiorari, the lower court's ruling on his own First Amendment claim was consistent with this "prior precedent." Pet. 20, 23. When Franks terminated Lane, there was "no reasonable prospect [that] the Eleventh Circuit w[ould] reverse itself." Pet. Reply 4. And the court of appeals did not even publish or sign its opinion in this case, illustrating the panel's view that its law was settled. *See* Pet. App. 1a-2a.

B. The Eleventh Circuit's case law is dispositive to the defense of qualified immunity.

Because the Eleventh Circuit's case law afforded essentially no protection to subpoenaed testimony about an employee's workplace, Lane has qualified immunity. A state officer cannot be expected to

anticipate that this Court or a court of appeals will overrule a circuit precedent. *Cf. Jameson v. Coughlin*, 22 F.3d 427, 429-30 (2d Cir. 1994) (appointed counsel cannot "be deemed incompetent for failing to predict" that a higher court would overrule its earlier precedent). A bright-line rule that allows state officers to follow the law of their circuit, regardless of how that law coheres with other precedents, has much to recommend it.

First, a bright-line would allow suits like this one to be resolved early in the process, without discovery into facts that might be relevant to the underlying constitutional claim. Because qualified immunity "is an immunity from suit, rather than a mere defense to liability," the Court has repeatedly "stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (citations and internal quotation marks omitted); *Malley v. Briggs*, 475 U.S. 335, 341 (1986); *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985); *Davis v. Scherer*, 468 U.S. 183, 195 (1984); *Harlow*, 457 U.S. at 818. Indeed, the "driving force" behind the creation of the doctrine was to ensure that "insubstantial claims against government officials [will] be resolved prior to discovery." *Anderson*, 483 U.S. at 640 n.2 (internal quotation marks omitted). If circuit-level precedent is clear, then a court can rule on qualified immunity immediately without also evaluating whether circuit-level precedent is *right*.

Second, a bright-line rule best serves the policies that underlie the doctrine. The doctrine of qualified immunity recognizes the "need to protect officials

who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority." *Harlow*, 457 U.S. at 807 (internal quotation marks omitted). It must balance the interest of officials with the interest of citizens in the unfettered exercise of their constitutional rights. *See id.; Davis*, 468 U.S. at 195. There is nothing to be gained from subjecting an official to suit if he followed the law of his circuit. The citizen's claimed constitutional right will almost certainly be rejected by the circuit court, and the citizen can request that the circuit overrule its case law as easily on appeal from qualified immunity as from a ruling on the merits. Much will be lost, however, if officers must second-guess federal cases before performing their official duties.

Finally, although it may seem odd that erroneous circuit-level precedent should control the qualified immunity question, that result is the necessary consequence of *stare decisis* and appellate review. This Court, and the courts of appeals, frequently instruct lower courts not to predict that a higher court will overrule on-point precedent based on the reasoning in an intervening decision. *E.g., Tenet v. Doe*, 544 U.S. 1, 10–11 (2005). *See also Garrett v. Univ. of Ala. at Birmingham Bd. of Trustees*, 344 F.3d 1288, 1292 (11th Cir. 2003) (court of appeals must apply its own binding case law unless directly overruled by the Supreme Court). State officers should be held to no higher standard than federal judges.

At the time of Lane's dismissal, Franks's home circuit had already permitted the dismissal of a

government employee based on his subpoenaed testimony, and its broad reading of "official duties" controlled. That case law was binding on Franks, it was binding on the district court, and it was binding on the court of appeals panel. Just as the lower courts were required to apply that binding authority, Franks is entitled to qualified immunity because of it.

CONCLUSION

The Court should reverse and remand with respect to Lane's claim against Burrow in her official capacity and affirm with respect to Lane's claim against Franks in his individual capacity.

Respectfully submitted,

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RESPONDENT'S BRIEF

RECORD
AND
BRIEFS

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In the Supreme Court of the United States

EDWARD R. LANE,
Petitioner,
v.
STEVE FRANKS, IN HIS INDIVIDUAL CAPACITY, AND SUSAN BURROW, IN HER OFFICIAL CAPACITY AS ACTING PRESIDENT OF CENTRAL ALABAMA COMMUNITY COLLEGE,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF OF RESPONDENT SUSAN BURROW

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ARGUMENT

I. The First Amendment protects some speech compelled by a subpoena on a matter of public concern, including the testimony at issue here.

This Court's existing framework for adjudicating the free speech claims of public employees already protects both the employees' constitutional rights and the employer's interest in controlling speech made on its behalf. *See Garcetti v. Ceballos*, 547 U.S. 410 (2006); *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563 (1968). Under that framework, the First Amendment protects Lane's speech at state senator Schmitz's corruption trial because he was not employed or paid to testify, and he spoke about a matter of paramount public concern. There is no need for this Court to adopt a special rule that applies to subpoenaed testimony, as Lane concedes, Pet. Lane Reply Br. 12.

Franks' proposed "citizen analogue" rule for evaluating free speech claims considers "whether the speech is part of the free flow of ideas and opinions" and "in particular whether a citizen would have had access to the information." Resp. Franks Br. 25–26 (internal quotation marks omitted). This rule is flawed for several reasons.

1. First, Franks' causation-focused "citizen analogue" test looks nothing like this Court's practical analysis in *Garcetti*. The core of *Garcetti*'s test is whether the employee's job duties encompassed the speech; the primary issue under

Franks' test is, instead, whether the public had access to the same information as the public employee. Resp. Franks Br. 25–30.

Franks emphasizes facts upon which this Court declined to rely in *Garcetti*. There, this Court plainly held that whether the speech concerned "the subject matter of [the plaintiff's] employment" is "nondispositive." 547 U.S. at 421. The Court reasoned that an employee might have a greater understanding of certain issues precisely because of his job; that is one of the reasons why his freedom to speak as a citizen on matters of public concern must be protected. *See Pickering*, 391 U.S. at 571–72 ("Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operations of the schools should be spent."). Accordingly, focusing on whether an employee had exclusive access to information misses the point.

Furthermore, in *Garcetti*, the court held that the fact that the employee "expressed his views inside his office, rather than publicly, is not dispositive." 547 U.S. at 420. Franks' proposed rule would leave unprotected all speech made within a government office, because no "citizen analogue" exists, even though it might also be "the kind of activity engaged in by citizens who do not work for the government." *Id.* at 423–24.

Instead, the First Amendment protects employees' job-related expression unless the employees speak "pursuant to their official duties" as "part of what [they were] employed to do." *Id.* at 421. Only if the speech "owes its existence" to the

employee's "professional responsibilities" may the employer exercise "control over what the employer itself has commissioned or created." *Id.* at 421–22. The reason is straightforward: an employee who "performed the tasks he was paid to perform" has merely spoken for the government "as a government employee," not as a citizen. *Id.* at 422.

2. Second, Franks' proposed rule is not administrable. Information is not a scarce resource; there is no way to know in the mine-run of cases whether the employee exclusively acquired certain knowledge because of his government service. Under Franks' rule, courts would have to speculate about whether some member of the public *could* have known the same facts as the employee.

That test is easily manipulated and cannot be applied in a principled way. For example, if the Court were to apply Franks' proposed test in this case, it could just as easily result in a loss for Franks as a win. Lane testified about Schmitz's failure to perform any work or show up at her office and her resulting dismissal. Any citizen with knowledge could have recounted the same facts: a client of the CITY program could have testified that Schmitz was never there, or Schmitz's friends and family members could have testified that she did no work for the CITY program. And, as Lane points out, several private citizens testified about Schmitz's actions at her trial. Pet. Lane Reply Br. 9. Nothing about the information that Lane conveyed puts it uniquely within the knowledge of government employees.

This Court's "practical" approach requires a more principled inquiry about an employee's job duties. *Garcetti*, 547 U.S. at 424. The question whether the government paid the employee to make the speech as part of his official duties can be answered without speculation, in keeping with "the content, form, and context" of the speech. *Connick v. Myers*, 461 U.S. 138, 147–48 (1983). Even though the same sentences might be protected or unprotected, depending on the circumstances, that is a necessary consequence of this Court's First Amendment case law, which routinely treats the same speech differently according to context. *Snyder v. Phelps*, 131 S.Ct. 1207, 1218 (2011) ("'[E]ven protected speech is not equally permissible in all places and at all times.'" (quoting *Frisby v. Schultz*, 487 U.S. 474, 479 (1988)).

3. Third, Franks' invocation of First Amendment principles misses the point as well. Although Franks argues that a citizen analogue rule would give greater protection to speech that is "close to the heart of debate," Resp. Franks Br. 25, that is far from certain. For example, a public relations officer's job duties may include writing editorials, which are classic vehicles for opinion and debate. Because she is paid, in part, to write editorials, any editorial written on her employer's behalf would still be speech pursuant to her official duties. See *Garcetti*, 547 U.S. at 422 (the employer must be able to control "what the employer itself has commissioned or created").

Franks also does not explain how the speech at issue in this case deserves less protection than the kinds of speech he concedes are protected. There is

no principled reason why the First Amendment's protections should apply with less force to Lane's speech at the senator's public corruption trial than to newspaper editorials. Testimony about a government official's unlawful actions relates just as clearly to a "matter of political, social, or other concern to the community." *Phelps*, 131 S.Ct. at 1216 (internal quotation marks omitted). Arguably, such speech is even more important than letters to the editor and Franks' other examples of "vibrant dialogue" in our society. Resp. Franks Br. 19, 25–26.

II. Qualified immunity protects government employers, like Franks, who rely on binding precedent in their own circuits.

The parties all agree that *Garcetti* and *Pickering* provide the answer to the first question presented. Pet. Lane Br. 13–25; Resp. Burrow Br. 14–30; Resp. Franks Br. 18–37. *See also* U.S. Br. 11–26. But the parties—like the circuit courts that considered the issue—differ widely on the proper method of analyzing testimony under this Court's precedents. These differences compel the conclusion that, notwithstanding *Garcetti*, the law in this area is not clearly established. Like Franks and the United States, Burrow believes that Franks is entitled to qualified immunity.

Lane's arguments to the contrary reveal fundamental misconceptions about the doctrine of qualified immunity. The point of qualified immunity is to protect government employers unless Supreme Court or circuit precedent clearly established that

their conduct was unlawful. *See Ashcroft v. Al-Kidd*, 131 S.Ct. 2074, 2080 (2011); *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Lane apparently believes that an employer must know not only his own circuit law, but also the law in other circuits, and he must be able to parse the distinctions between cases in his home circuit and others to determine which appellate decision is right. Especially where his home circuit's precedent "[c]onflicts [w]ith [t]he [p]recedents [o]f [o]ther [c]ourts [o]f [a]ppeals," Pet. 6, no government employer should have to perform the job of a Supreme Court Justice to determine the appropriate course of action.

Lane also misreads Eleventh Circuit precedent in contending that it did not foreclose his First Amendment claim. The court of appeals had already held in a similar case that employee testimony about the subject matter of that employee's job was unprotected. *Morris v. Crow*, 142 F.3d 1379 (11th Cir. 1998). Lane asserts that Eleventh Circuit case law "actually supported petitioner" and "*Morris* was wrongly decided at the time." Pet. Lane Br. 35, 39. But the court of appeals did not see its own precedents this way. Lane points to *Martinez v. City of Opa-Locka*, 971 F.2d 708 (11th Cir. 1992), but the court of appeals did not consider that case to be controlling or even cite it. *See* Pet. Lane Br. 35–39; Pet. App. 2a–8a. Government employers cannot be expected to know the state of the law better than the federal appellate courts. Accordingly, Lane's own arguments illustrate that Eleventh Circuit law was not clearly established in his favor. Pet. Lane Br. 34–45.

Finally, although Respondent Burrow contends that the first question presented can be resolved under this Court's existing precedents, those precedents left room for the courts of appeals to determine whether and to what extent testimony about an employee's job is protected under the First Amendment. *Cf.* Pet. Lane Reply Br. 20. Lane's persuasive argument that the Eleventh Circuit was wrong on the first question presented does not mean that the law was clearly established in his favor. Even though Lane spoke as a citizen when he testified at Schmitz's trial, Franks is entitled to qualified immunity because binding precedent in his home circuit held otherwise.

Respectfully submitted,

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RESPONDENT'S BRIEF

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AND
BRIEFS

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No. 13-483

IN THE

Supreme Court of the United States

EDWARD LANE,

Petitioner,

v.

SUSAN BURROW, ACTING PRESIDENT OF CENTRAL ALABAMA COMMUNITY COLLEGE, and STEVE FRANKS,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Under this Court's precedent, did the Eleventh Circuit correctly hold that petitioner Edward Lane's factual trial testimony pursuant to a subpoena was not protected by the First Amendment?

2. Under the doctrine of qualified immunity, does respondent Steve Franks have immunity from petitioner Edward Lane's First Amendment retaliation claim brought pursuant to 42 U.S.C. § 1983?

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PARTIES TO THE PROCEEDINGS BELOW

Pursuant to Rule 24.1(b), the parties to the proceedings below were petitioner Edward Lane, respondent Steve Franks (in both his individual and official capacities), and Central Alabama Community College, a defendant-appellee below.

Steve Franks is now retired from his former position as President of Central Alabama Community College. Respondent Susan Burrow, the current president of Central Alabama Community College, has been substituted for Steve Franks on petitioner Edward Lane's official capacity claim.

PRELIMINARY STATEMENT

This is not a case in which the Court should overturn well settled precedents such as *Garcetti v. Ceballos*, 547 U.S. 410 (2006). This is also not a case that should call into question those values that define us as Americans, such as the freedom of speech that has been at the core of our liberties since the inception of our nation or the citizen's duty to obey and testify truthfully when subpoenaed. Petitioner Edward Lane ("Lane") invokes these values in defense of his position, asking the Court to adopt a categorical rule in an area – the workplace of the government employee – where the Court has traditionally taken great care to avoid doing so, instead opting to carefully examine the specific circumstances of each case.

Existing jurisprudence, such as *Pickering v. Board of Education*, 391 U.S. 563 (1968), and *Connick v. Myers*, 461 U.S. 138 (1983), gave rise to the delicate balancing of the government's interest in efficiency and the government employee's interest in free speech. This approach was arrived at after much analysis and forethought, and there is nothing in either *Garcetti* or in this appeal that should necessitate its demise. *Garcetti*, *Pickering*, and the case at bar can and should be harmonized, and a categorical approach, such as the one for which Lane advocates, is out of order.

The answer to the First Amendment question presented in this case resides in *Garcetti*. In that opinion's discussion of the "theoretical underpinnings" of the Court's government employee decisions, 547 U.S. at 423, the Court identified the key to the question currently before it: "When a public employee speaks pursuant to employment responsibilities, . . . there is no relevant analogue to speech by citizens who are not government employees." *Id.* at 424. Coupled with the Court's instruction that the location (*i.e.*, forum) of the speech is not dispositive, *see id.* at 420, the critical question for the "citizen analogue" analysis becomes whether a citizen would have had access to the information contained in the speech and whether it was merely factual in nature, or whether it was the kind of speech that resides closer to the heart of the First Amendment (*i.e.*, ideas and opinion relating to civic discussion and public debate), such that the speech could have been made by a citizen. *See id.* at 423-24.

Where, as here, the speech (1) was entirely based on information not available to citizens, (2) was merely factual in nature, and (3) did not consist of the kind of "ideas and opinion" speech found in debate or advocacy, it is not as close to the heart of First Amendment values, and the issuance of a subpoena triggering its occasion does not alter its character. In these circumstances, adoption of the broad categorical rule

Lane favors – protection of all subpoenaed speech simply by virtue of the issuance of the subpoena – is ill advised, renders the location or forum of the speech determinative, and is otherwise unsupported by precedent. The Eleventh Circuit's decision should be affirmed.

Furthermore, respondent Steve Franks ("Franks") is entitled to qualified immunity from Lane's claim of First Amendment retaliation because it was not clearly established at the time of Lane's termination that his testimony was protected speech under the First Amendment. This Court's precedent did not clearly establish such protection, and Eleventh Circuit precedent actually established just the opposite.

STATEMENT OF THE CASE

Background

From September 2006 to January 2009, Lane held a probationary position as Director of the Community Intensive Training for Youth Program ("CITY") at Central Alabama Community College ("CACC"). Pet. App. 2a-3a, 10a, 14a. In his job as Director, Lane ran CITY, including day-to-day operations, hiring and firing of employees, and making financial decisions. *Id.* at 10a.

Soon after becoming Director, and well before Franks ever came to CACC or the State of

Alabama, Lane audited CITY's finances and discovered that then-state representative Suzanne Schmitz ("Schmitz") was listed on CITY's payroll but was not reporting for work and had not otherwise performed work for CITY. *Id.* at 2a, 11a. Lane thereafter terminated Schmitz's employment on October 19, 2006, after she refused to report to work. *Id.* "No one disputes that Lane was acting pursuant to his official duties as CITY's Director when he investigated Schmitz's work activities, spoke with Schmitz and other CACC officials about Schmitz's employment, and ultimately terminated Schmitz's employment." *Id.* at 7a; *see also id.* at 10a. Further, no one disputes that Franks, who did not come to CACC until 2008, was not involved in Schmitz's 2006 termination. *See Lane v. Franks*, No. 4:11-cv-00883-KOB (N.D. Ala. 2012), Docket Entry ("DE") 35-3[1] (Franks Decl.) ¶¶ 2-3.

Franks had a career in Arkansas spanning eleven years prior to returning to Alabama in January 2008 to take the position of President of CACC under Bradley Byrne, then-Chancellor of

---

[1] In addition to being electronically available on the district court's docket via PACER, the documents referenced herein are also contained in the Expanded Record Excerpts, Volumes I-II, filed by Lane with the Eleventh Circuit on January 15, 2013, or in Appellee's Supplemental Expanded Record Excerpts filed by Franks with the Eleventh Circuit on April 3, 2013.

Alabama's two-year college system, who was attempting to rid the two-year system of the scandal that included Schmitz's termination and (later) criminal indictment. *See id.* ¶ 2. Lane did not begin reporting to Franks until November 20, 2008. Pet. App. 13a.

The subject testimony

The FBI investigated Schmitz, and criminal charges were brought. Pet. App. 2a-3a, 12a. All of Lane's testimony against Schmitz occurred either before he came under Franks' supervision in November 2008 or after Lane was terminated in January 2009. *Id.* at 2a-3a, 12a-13a. Lane testified before a grand jury against Schmitz on November 13, 2006, while Franks was still in Arkansas and was not associated with Alabama's two-year college system in any way. *Id.* at 12a; *see also* DE-35-3 (Franks Decl.) ¶ 2-3. He testified "that Schmitz did not show up for her job at" CITY. DE-35-1 (Lane Dep.) 188:4-18; DE-11 (Am. Compl.) ¶ 30; DE-38-3 (Excerpts from Lane's 2008 testimony ("2008 testimony")) 202 ("Q: And in the grand jury, did you testify . . . as to the lack of work performed by [Schmitz]? A: I did."); Pet'rs Br. 2.

Thereafter, Lane was subpoenaed to testify and did testify in Schmitz's August 2008 criminal trial in federal court, before he began reporting to Franks in November 2008. Pet. App. 2a-

3a, 12a-13a. Lane again testified "that Schmitz did not show up for her job at the CITY Program . . . ." DE-35-1 (Lane Dep.) 188:4-18; DE-11 (Am. Compl.) ¶¶ 29-31; *see also generally* DE-38-3 (2008 testimony). Specifically, he testified that he "found that Ms. Schmitz didn't report to any particular – her office was there in Huntsville, [Alabama,] but from what I could ascertain, she had not been coming to this office." DE-38-3 (2008 testimony) 172. He also testified about conversations he had with Schmitz about her work responsibilities, Schmitz's failure to report to work even after he instructed her to do so, and that he fired Schmitz because of her failure to come to work or do her job at CITY. Pet. App. 3a, 12a-13a; DE-38-3 (2008 testimony) 177-87. Lane did not offer any opinions, only factual testimony. *See generally* DE-38-3 (2008 testimony);[2] *see also* DE-11 (Am. Compl.) ¶ 31 ("On August 26, 2008, Lane testified to these *facts* again during Schmitz's criminal trial in federal court.") (emphasis added).

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[2] Full transcripts of Lane's 2008 and 2009 trial testimony are available on PACER. *See United States v. Schmitz*, No. 5:08-cr-00014-RDP-PWG (N.D. Ala.) DE-118 & DE-195. The Court may take judicial notice of this testimony. *See* FED. R. EVID. 201; *see also, e.g., Horne v. Potter*, 392 F. App'x 800, 802 (11th Cir. 2010) (courts may take judicial notice of court documents in the public record); *accord Powell v. Rios*, 241 F. App'x 500, 501 n.1 (10th Cir. 2007) (same); *Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n.6 (9th Cir. 2006) (same).

After the November 2008 trial resulted in a mistrial, Lane testified at Schmitz's February 2009 trial, pursuant to a subpoena, when he was no longer a CACC employee. Pet. App. 13a. Lane's testimony at Schmitz's February 2009 trial is not at issue since Franks had already terminated Lane when Lane received notice that he would be testifying at that trial, and there is no dispute Franks did not know about that trial – and certainly not Lane's testimony therein – until after it occurred. *Id.* at 18a. Even so, as at the November 2008 trial, Lane's testimony in the February 2009 trial was solely factual. *See generally* DE-38-5 (Excerpts from Lane's 2009 testimony); *see also* Pet. App. 3a, 12a-13a; DE-11 (Am. Compl.) ¶ 32 ("On February 18, 2009, Lane again testified to these *facts* in a second federal criminal trial of Schmitz.") (emphasis added).

Franks never instructed Lane not to testify or otherwise attempted to prevent him from testifying. Pet. App. 18a. Lane states in his brief that after he terminated Schmitz, she "vowed to retaliate against him, informing another CITY employee that she planned to 'get [petitioner] back,' and that, if petitioner ever sought funds for CITY from the legislature, she would inform him, 'you're fired.'" Pet'rs Br. 3. Importantly, there has never been any evidence that Franks was made aware of these statements, and "[t]he parties do not dispute that Dr. Franks was not aware of any statements by Ms. Schmitz that she

would see to it that Mr. Lane would lose his job after he testified against her." Pet. App. 18a. There is no dispute that Franks never had any contact with or even met Schmitz. *See* DE-35-3 (Franks Decl.) ¶ 3.

Finally, while both Lane and respondent Susan Burrow cite several newspaper articles discussing Schmitz's criminal trials and the general investigations pertaining to the corruption scandal in Alabama's two-year college system, Pet'rs Br. 18-19, Burrow Br. 3-5, 7-8, none of those articles mentions Franks, who was brought in under Chancellor Byrne to be part of the solution, not the problem.

Lane's termination

Franks did not terminate Lane's employment soon after he testified at Schmitz's 2008 criminal trial, but over four months later, along with 28 other CITY employees, due to financial reasons. *Compare* Pet. 3 *with* Pet. App. 3a-4a, 12a-14a.

In 2008, CITY's budget had been cut significantly, by $1.75 million, which was approximately one-fourth of CITY's entire budget. DE-35-3 (Franks Decl.) ¶ 6; *see also* Pet. 3a. Consequently, Lane was already considering a Reduction in Force ("RIF") at CITY before he began re-

porting to Franks in November 2008. Pet. App. 13a-14a; *see also id.* at 3a.

Lane communicated these budget problems to Franks in November 2008, *id.* at 13a, as well as his belief that due to those problems, it was imperative that they start to put together a RIF policy to present to Chancellor Byrne. DE-35-1 (Lane Dep.) 148:16-149:19; *see also* Pet. App. 13a-14a. Lane and Franks also had discussions "during the November/December time frame" about RIFs. DE-35-2 (Franks Dep.) 64:13-65:4; *see also* Pet. App. 13a-14a.

By the end of 2008, CITY was in danger of not making its monthly payroll on time every month, if at all. Pet. App. 13a-14a. Both Franks and Lane readily acknowledge that "[t]here was not going to be enough money allocated every month to pay all the employees." DE-35-3 (Franks Decl.) ¶ 6; DE-35-1 (Lane Dep.) 149:10-19. Franks therefore agreed with Lane's November 2008 assessment that a reduction in force was necessary. Pet. App. 13a-14a.

Franks' initial response was that they needed to terminate all the probationary employees. *Id.* As such, Franks made a financial decision to terminate Lane, and multiple other probationary employees associated with CITY, on January 9, 2009. *Id.* Lane and the other terminated employees "had not reached three

years of service, and, thus, were still considered probationary." DE-35-3 (Franks Decl.) ¶ 5; *see also* DE-35-2 (Franks Dep.) 65:14-66:10.

Franks thereafter rescinded the termination of certain employees, none of whom held a Director position like Lane, due to an ambiguity in their probationary service. *See* Pet. App. 3a-4a, 16a. Franks did not rescind Lane's termination when he rescinded the terminations of most of the other employees because he believed that Lane was in a fundamentally different category than the other employees: he was the director of the entire CITY program, and not simply an employee. *Id.* at 16a-17a. Franks believed that Lane had always been a CACC employee subject to a three-year, as opposed to a six-month, probationary period. *See id.*; *see also* DE-35-2 (Franks Dep.) 70:6-9.

Lane testified that he has never had any reason to believe that Franks was out to get him or that Franks' stated reasons for his termination and not rescinding that termination were not the real reasons:

> Q: Did you ever have any words with Dr. Franks, any disagreement with him?
>
> A: No.

Q: Did he ever give you any indication that he didn't like you?

A: He did not.

Q: Or that he had any kind of agenda or anything like that against you?

A: No.

Q: Do you have any reason to believe that he was being less than honest and truthful with you with everything that he said?

A: No.

DE-35-1 (Lane Dep.) 231:9-22.

Unfortunately, budget problems continued to plague CITY, and the "program went out of existence" in September 2009. DE-35-2 (Franks Dep.) 33:12-18; *see also* DE-35-3 (Franks Decl.) ¶ 6; Pet. App. 15a-16a.

Course of the proceedings

On January 3, 2011, almost two years after his termination and without any prior notice to his former employer that he believed his termination was in any way retaliatory, Lane filed an action in the district court alleging, among other claims, First Amendment retaliation against Franks. *See* Pet. App. 18a. He later amended his complaint, but still alleged the same claims. *See id.* at 19a.

On April 30, 2012, Franks moved for summary judgment, arguing, *inter alia*, that Lane's testimony was not protected speech and that Franks had qualified immunity from such claim regardless. *See generally* DE-34. On October 18, 2012, the district court, relying on Eleventh Circuit precedent, found that Lane's speech was not protected and granted Franks' motion. *See* Pet. App. 29a-31a, 34a-35a. It also found that, in any event, "a reasonable government official in Dr. Frank's [*sic*] position would not have had reason to believe that the Constitution protected Mr. Lane's testimony made pursuant to a subpoena at Ms. Schmitz's trial because the unlawfulness of his action was not recognized in a concrete and factually defined context." *Id.* at 34a (citation, quotation marks, and ellipses omitted).

On appeal, the Eleventh Circuit affirmed the district court's determination "that Lane's speech was made pursuant to his official duties as CITY's Director, not as a citizen on a matter of public concern." *Id.* at 4a. The court reasoned that the fact "[t]hat Lane testified about his official activities pursuant to a subpoena and in the litigation context, in and of itself, does not bring Lane's speech within the protection of the First Amendment." *Id.* at 7a. It then discussed and applied its own precedents to hold that the record failed "to establish that Lane testified as a citizen on a matter of public concern . . . ." *Id.* at 8a; *see also id.* at 6a-7a. Lane's petition for a writ of certiorari followed.

SUMMARY OF THE ARGUMENT

The Eleventh Circuit's decision should be affirmed because Lane's testimony was not protected by the First Amendment. The categorical rule pressed by Lane – that all subpoenaed testimony should be protected under the First Amendment – is overbroad and out of place in this area of the law which traditionally has been the site of careful balancing tests, *see Pickering*, 391 U.S. at 568, attention to an "enormous variety of fact situations," *id.* at 569, and an emphasis that "[t]he proper inquiry is a practical one[,]" *Garcetti*, 547 U.S. at 424.

The Court need not look far for the answer to the First Amendment question posed by this case. It is contained in *Garcetti*, where the Court, in discussing the "theoretical underpinnings" of its government employee decisions, 547 U.S. at 423, states: "When a public employee speaks pursuant to employment responsibilities, . . . there is no relevant analogue to speech by citizens who are not government employees." *Id.* at 424. *Garcetti* also held that the location of the speech is not dispositive. *Id.* at 420. The "citizen analogue" inquiry demands more. It requires that a court determine (a) whether a citizen would have had access to the information contained in the speech and whether it was merely factual in nature, or (b) whether it was the kind of speech that resides closer to the heart of the First Amendment (*i.e.*, ideas and opinion relating to civic discussion and public debate), such that the speech could have been made by a citizen, as in the "letter to the editor" or "political discussion with a co-worker" examples given by the Court in *Garcetti*. *See id.* at 423-24.

This critical distinction sorts properly between speech that is part of the free flow of ideas and opinions, which has a citizen analogue, and speech that could not have been spoken by a citizen. It sorts properly between the routine testimony of police officers about traffic stops or arrests (no citizen analogue) and letters to the editor, like that penned by the teacher in *Pickering*,

that could have been written by a citizen (citizen analogue). It sorts properly between "sensitive or confidential information," ranging from tax records and trade secrets to information about law enforcement sources (no citizen analogue), US Br. 18, and political speech with a co-worker, *Garcetti*, 547 U.S. at 423-24 (citizen analogue).

Where, as here, the speech was entirely based on information not available to citizens and was merely factual in nature – consisting of Franks' correspondence with and his firing of Suzanne Schmitz – the Eleventh Circuit properly found the speech unprotected because it "touched only on acts [Lane] performed as part of his official duties." Pet. App. 7a. The Eleventh Circuit's decision should be affirmed.

Even if the Court holds (which it should not) that Lane's speech is protected by the First Amendment, Franks still has qualified immunity because the law was not clearly established that his speech was so protected. As evidenced by the granting of certiorari in this case, the issue of whether subpoenaed testimony of a government employee is protected by the First Amendment is far from settled. The Court's decision in *Garcetti* left the question open, 547 U.S. at 424 ("We thus have no occasion to articulate a comprehensive framework for defining the scope of an employee's duties in cases where there is room for serious debate"), and Eleventh Circuit precedent

squarely held that Lane's speech was not protected under *Morris v. Crow*, 142 F.3d 1379 (11th Cir. 1998). Pet. App. 7a n.3 ("*Morris* is the law in this Circuit on the question of public employee speech per a subpoena in the context of judicial proceedings."); *id.* at 8a. Moreover, the fact that a circuit split exists on the question assists rather than hurts Franks' argument that the law was not clearly established. Franks is thus entitled to qualified immunity, and the Eleventh Circuit's decision should be affirmed.

ARGUMENT

I. The Eleventh Circuit Correctly Held that Lane's Testimony Was Not Protected by the First Amendment.

This case stands at the intersection of several important values: free speech, the importance of citizen testimony under subpoena, and the government's interest in efficiency. The Court's existing precedents – when properly harmonized – are sufficient to ensure that all of these interests are honored. The Eleventh Circuit's decision should be affirmed.

A. Settled Government Employee First Amendment Precedents Eschew a Categorical Approach and Are Based on Careful Assessment of the Government Employee's Free Speech Rights and the Government's Interests in the Particular Case.

The Eleventh Circuit's judgment that Lane's factual subpoenaed testimony was not protected is supported by this Court's precedents.

As the Court has recognized, "[a]t the heart of the First Amendment is the recognition of the fundamental importance of the free flow of *ideas* and *opinions* on matters of public interest and concern." *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988) (emphasis added). Vigorous public debate and the "freedom to speak one's mind" are at the core of the protection provided by the First Amendment, which all citizens of this nation hold particularly dear. *See id.* at 51 (citations and quotation marks omitted) (Court is "vigilant to ensure that individual expressions of ideas remain free from governmentally imposed sanctions"); *see also, e.g., Snyder v. Phelps*, 131 S. Ct. 1207, 1220 (2011) ("As a Nation we have chosen . . . to protect even hurtful speech on public issues to ensure that we do not stifle public debate."). So it is that "[t]he freedom of speech . . . guaranteed by the Constitution embraces at the least the liberty to discuss

publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment." *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 469 (2007) (citation and quotation marks omitted).

Government employees, like all citizens, should participate in and contribute to vibrant dialogue in a democratic society. Indeed, "[p]ublic employees are often the members of the community who are likely to have informed *opinions* as to the operations of their public employers, operations which are of substantial concern to the public." *City of San Diego v. Roe*, 543 U.S. 77, 82 (2004) (emphasis added). Thus, the Court's First Amendment jurisprudence is concerned with "civic discussion," "public debate," and "vibrant dialogue in a democratic society," *i.e.*, with employees (whether they be private or public) being allowed to offer *opinions* on a variety of topics – including their employment – without fear of retaliation by their employer. *See Garcetti*, 547 U.S. at 419-20.

However, the Court has also acknowledged that all speech is not the same. For example, as noted in Justice Breyer's dissent in *Garcetti*, "the First Amendment cannot offer all speech the same degree of protection. Rather, "judges must apply different protective presumptions in different contexts, scrutinizing government's speech-related restrictions differently" depending upon

the nature of the speech. 547 U.S. at 444-45 (comparing *Burson v Freeman*, 504 U.S. 191 (1992) (political speech) with *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980) (commercial speech) and *Rust v. Sullivan*, 500 U.S. 173 (1991) (government speech)); *see also Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 249 (2010) (discussing level of scrutiny applicable to misleading commercial speech). It is out of just such an acknowledgment that *Pickering*, *Connick*, and *Garcetti* came to pass, and the decision at issue in this action is congruous with those precedents.

1. *Pickering* Balancing.

In *Pickering v. Board of Education*, 391 U.S. 563 (1968), the Court recognized that the nature of the speech at issue – government employee speech – necessitated a different approach. Pickering was a teacher who sent a letter to a local newspaper criticizing the manner in which the Board of Education and district superintendent had handled proposals to raise new revenue for the schools. 391 U.S. at 564. The Board determined that the letter was "detrimental to the efficient operation and administration of the schools of the district" and fired Pickering. *Id.* Pickering argued, successfully, that his rights to freedom of speech were violated. *Id.* at 565. In holding in Pickering's favor, the Court set out its balancing test, which provided for balancing "the interests of the [government employ-

ee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.* at 568. The Court noted the "enormous variety" of situations in which such statements may be made and thus declined to "lay down a general standard," or a bright-line rule, to govern the analysis. *Id.* at 569.

Twenty-five years later, the Court, in *Connick v. Myers*, 461 U.S. 138 (1983), declined once again to set out a "general standard" due to the "enormous variety" of differing situations. 461 U.S. at 154 (citation omitted). Using the *Pickering* balancing test, this time the Court held in favor of the Government, noting that "the First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs." *Id.* at 149.

2. *Garcetti*: Declining To Protect Government Employee Speech Made "Pursuant to the Employee's Official Duties."

In 2006, the Court decided *Garcetti v. Ceballos*, which presented the question "whether the First Amendment protects a government employee from discipline based on speech made pursuant to the employee's official duties." 547 U.S. 410, 413 (2006). Ceballos, a deputy district attorney, wrote a disposition memorandum rec-

ommending dismissal of a case based on his concerns about inaccuracies in an affidavit used to obtain a critical search warrant. *Id.* at 413-14. Ceballos took heavy criticism regarding his handling of the case and claimed that in the aftermath, he was subjected to retaliatory employment actions on account of the disposition memorandum. *Id.* at 415. Garcetti argued that the actions taken were explained by legitimate reasons, such as staffing needs, and that the memorandum was not protected by the First Amendment. *Id.*

The Court held that *Pickering* and its progeny set forth two guiding inquiries: "The first requires determining whether the employee spoke as a *citizen* on a matter of public concern. If the answer is no, the employee has no First Amendment cause of action based on his or her employer's reaction to the speech." 547 U.S. at 418 (internal citation omitted) (emphasis added). However, "[i]f the answer is yes . . . [t]he question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public." *Id.*

As in *Pickering* and *Connick*, the Court noted "the enormous variety of fact situations in which critical statements by . . . public employees may be thought by their superiors . . . to furnish grounds for dismissal," which sometimes

makes the analysis "difficult." *Id.* (citation omitted). The Court also noted the need for governmental employers to have a "significant degree of control over their employees' words and actions," because otherwise, "there would be little chance for the efficient provision of public services." *Id.* Indeed, when public employees "speak out, they can express views that contravene governmental policies or impair the proper performance of governmental functions." *Id.* at 419. Still, because "a citizen who works for the government is nonetheless a citizen," when they are "speaking *as citizens* about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively." *Id.* (emphasis added). Thus, *Pickering*'s balancing test "acknowledge[s] the necessity for informed, vibrant dialogue in a democratic society." *Id.*

According to the Court, the controlling factor was "that [Ceballos'] expressions were made pursuant to his duties as a calendar deputy." *Id.* at 421. The Court therefore held that "when public employees make statements pursuant to their official duties, *the employees are not speaking as citizens* for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Id.* (emphasis added). The Court reasoned that "[r]estricting speech that owes its existence to a public employee's professional responsibilities

does not infringe any liberties the employee might have enjoyed *as a private citizen.*" *Id.* at 421-22 (emphasis added).

3. The "Citizen Analogue" Inquiry Is the Key to the "Pursuant to Official Duties" Riddle.

Garcetti made a critical distinction that should guide the Court in determining whether a government employee's speech was made "pursuant to his duties." The Court first discussed speech relating to debate or complaints as the sort of speech closely related to citizenry and the heart of the First Amendment: "Employees who make public statements outside the course of performing their official duties retain some possibility of First Amendment protection because that is the kind of activity engaged in by citizens who do not work for the government. The same goes for writing a letter to a local newspaper, *see Pickering, supra*, or discussing politics with a coworker." *Id.* at 423 (citation omitted). In contrast, "[w]hen a public employee speaks pursuant to employment responsibilities . . . *there is no relevant analogue to speech by citizens who are not government employees.*" *Id.* at 424 (emphasis added).

The Court articulated this distinction in its discussion of the "theoretical underpinnings of [its] decisions[,]" *id.* at 423, and it is the lodestar

that should guide the Court's determination of whether a government employee has spoken "pursuant to his duties." It is congruent with *Pickering* and *Connick*, not in opposition to those cases. Importantly, the location or forum in which the speech occurs is not determinative. *Id.* at 420. Accordingly, it is the character of the speech that is the focus.

Under *Garcetti*, the proper inquiry, then, is whether the speech is part "of the free flow of ideas and opinions[,]" *Hustler*, 485 U.S. at 50, close to the heart of debate, part of every American citizen's birthright under the First Amendment. The teacher's speech in *Pickering* criticizing his employer in a letter to the editor clearly was. If so, such speech has a citizen analogue, the government employee has spoken as a citizen, and the speech should be subject to *Pickering* balancing to determine if it is protected by the First Amendment. If, however, the speech is not of such character – or if it would be impossible for a citizen to speak in such a way because he would not be privy to such information – "there is no relevant analogue to speech by citizens who are not government employees[,]" and thus no protection under the First Amendment. *Garcetti*, 547 U.S. at 423-24.

By focusing on the character of the speech rather than the location or forum in which it occurs, and in particular whether a citizen would

have had access to the information imparted in the speech, the "citizen analogue" inquiry prevents absurd results. Distinctions can then be drawn between, on the one hand, confidential information given to the government such as individuals' social security numbers, HIPAA information, or sensitive military information to which citizens would not have access, and on the other hand, the "letter to the editor" types of complaints or "discussions of politics" identified in *Garcetti* as having citizen analogues.[3] 547 U.S. at 423.

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[3] The United States suggests that the government employer's interest in prohibiting the disclosure of sensitive or confidential information can be addressed by the second step of the *Pickering* test. US Br. 18. But the second step of the *Pickering* test discusses the government's interest in "operat[ing] efficiently and effectively." *Garcetti*, 547 U.S. at 419. The government employer's interest in limiting the dissemination of sensitive or confidential information, given to the government in trust by citizens (such as HIPAA information) or in the course of protecting public safety (such as information regarding a law enforcement or terrorism investigation), is far stronger than its interest in efficiency. Accordingly, the "citizen analogue" inquiry is most faithful to *Garcetti* because it does not subject such speech to *Pickering* balancing unless a citizen analogue exists. Moreover, the knowledge that information given to the government may be protected by the First Amendment and thus disseminated under subpoena may chill citizens' willingness to provide the government with accurate or complete information, which would surely harm the government's efficiency interests.

Furthermore, in deciding *Garcetti*, the Court expressly declined to "articulate a comprehensive framework for defining the scope of an employee's duties in cases where there is room for serious debate." *Id.* at 424. It emphasized that "[t]he proper inquiry is a practical one[,]" not one that turns on formal job descriptions. *Id.* at 424-25. The "citizen analogue" inquiry is consistent with this approach and should guide the Court's determination if it is to remain faithful to the direction taken in *Garcetti* and to the "theoretical underpinnings of [its] decisions." *Id.* at 423.

Such an inquiry also makes far more sense than merely asking whether the government paid the employee for the speech, which leads to the bizarre result that, regardless of the character of the speech, sometimes the very same sentences could be protected or unprotected, based on the vagaries of pecuniary compensation.

B. Properly Applied, this Court's First Amendment Precedents Support Affirmance of the Eleventh Circuit's Decision.

In the circumstances of this case, Lane's subpoenaed testimony was limited entirely to the facts surrounding his correspondence with and firing of Suzanne Schmitz. *See supra* pp. 6-8.

The Eleventh Circuit therefore correctly considered the character of Lane's speech, which it found "touched only on acts he performed as part of his official duties[,]" Pet. App. 7a, *i.e.*, only on factual matters related to his role as Schmitz's former boss. This was information not available to citizens, and, thus, without "citizen analogue."

Lane was not engaging in "civic discussion," "public debate," or "vibrant dialogue" when he testified at Schmitz's trial. He did not criticize the government or speak critically about his superiors or the workplace, as the government employee did in *Pickering* and many of its progeny. There was no "letter to the editor," as in *Pickering*, or any functional equivalent. Lane was not picketing to express his *opinion* on matters of public corruption or, for that matter, his *opinion* on any other issue. *Compare Snyder*, 131 S. Ct. at 1213. He never entered the "marketplace of ideas." *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 8 (1986). Instead, he provided only fact-based testimony related to his interactions with Schmitz while he was her boss for which there was no citizen analogue. Only Lane knew the facts of Schmitz's termination since only Lane was her boss; no citizen who was not a government employee could have provided the factual testimony provided by Lane.

Certainly the corruption scandal involving Schmitz was a matter of public concern. Howev-

er, the inquiry does not end there. The issue of whether or not a public concern exists must not be conflated with the issue of whether a government employee's speech was "pursuant to his duties." Merely reciting (1) that the speech was subpoenaed testimony, (2) that, as such, it was a matter of public concern, and (3) that therefore Lane must have been speaking as a citizen is a simplistic syllogism. *See Garcetti*, 547 U.S. at 416 ("The Court of Appeals determined that Ceballos' memo . . . was 'inherently a matter of public concern.' . . . The court did not, however, consider whether the speech was made in Ceballos' capacity as a citizen.").

It would be hard to argue that the speech in *Garcetti*, which concerned an affidavit filled with "serious misrepresentations" that could result in criminal consequences, was not an issue of public concern. The public has an interest in criminal prosecutions being conducted properly just as it has an interest in seeing corruption addressed. And yet, the Court did not hold that the presence of an issue of public concern in *Garcetti* finished the inquiry. Moreover, even under *Pickering*, if the answer to the question whether the employee spoke as a citizen of a matter of public concern is yes, only "the *possibility* of a First Amendment claim arises." *Garcetti*, 547 U.S. at 418 (citing *Pickering*, 391 U.S. at 568) (emphasis added). Lane's approach would make

such possibility an absolute certainty in the subpoena context.

Lane's testimony merely stated that Schmitz did not show up to work and described the circumstances of her firing. Such factual testimony surrounding the terms and conditions of an employee's employment has *no citizen analogue*. It is speech Lane could only make pursuant to his duties as an employee – a citizen would have no occasion to know any of the factual information he divulged. For all of these reasons, the judgment of the Eleventh Circuit in favor of Franks should be affirmed.

C. The Court Should Decline To Adopt a Bright-Line Rule Holding that Subpoenaed Testimony Is Always Protected.

No one will represent to this Court that the subpoena power is not important to securing truthful testimony, or that a citizen's testimony for the benefit of the public is not part of his duty as an American. But contrary to Lane's argument, simply uttering these broad statements does not answer the question presented – at least, not if the Court is to remain faithful to its government employee precedents. *Garcetti* did not alter the careful, nuanced approach the Court has taken for almost half a century in considering both the employee's free speech rights

and the government employer's need for efficiency. Rather, *Garcetti* began to articulate the circumstances in which the government's interest was stronger – *i.e.*, where there was no citizen analogue to the speech – so that the speech was made pursuant to the employee's official duties.

If the Court were to take a categorical approach and hold, as Lane urges, that all subpoenaed testimony is, by its nature, citizen speech, it would contravene *Garcetti*'s holding that the location of the speech is not determinative. The Eleventh Circuit recognized as much, stating that the fact that "Lane testified . . . pursuant to a subpoena and in the litigation context, in and of itself, does not bring Lane's speech within the protection of the First Amendment." Pet. App. 7a.

Treating all subpoenaed government employee speech the same, simply by virtue of the issuance of a subpoena, would create a multitude of problems. Even Lane concedes immediate exceptions to the rule, such as witnesses called pursuant to Federal Rule of Civil Procedure 30(b)(6). *See* Pet'rs. Br. 12-13 n.4; *see also* Pet. 20 ("Of course, it may be possible to imagine cases in which a public employee's duties include such testimony. . . ."). These concessions demonstrate that a categorical rule protecting all subpoenaed testimony is unworkable.

Worse from a jurisprudential perspective, Lane's approach would impose an overly inclusive, bright-line rule into what, to date, has been a "practical" inquiry. *Garcetti*, 547 U.S. at 424. Lane's approach flies in the face of the Court's instructions in other First Amendment precedents that courts are required "to carefully review the record" and take caution to limit "the reach of [their] opinion[s] by the particular facts before [them]." *Snyder*, 131 S. Ct. at 1220.

Importantly, the "citizen analogue" inquiry is not equivalent to the statement in *Garcetti* that "speech that owes its existence to a public employee's professional responsibilities" is speech made pursuant to a public employee's duties and is therefore unprotected. *See* 547 U.S. at 421-22. Government employee speech may be informed by information the employee has come across in the context of his employment but still be protected by the First Amendment because it consists of ideas and opinion relating to civic discussion and public debate; thus, there is a citizen analogue to the speech and *Pickering* balancing is appropriate. *See, e.g., Pickering*, 391 U.S. at 572 ("Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely . . . .").

However, where there is no citizen analogue to the speech, as in this case and in *Garcetti*, because the speech is based on information possessed by the government employee to which no citizen would have access, the "theoretical underpinnings" of the Court's government employee decisions, *Garcetti*, 547 U.S. at 423, support that such speech is unprotected. This is particularly so where, as here, the speech is factual in nature rather than consisting of opinion.

This approach also properly takes account of the speech listed in the United States' amicus brief involving "sensitive or confidential information, which may range from tax records and trade secrets to information about law enforcement sources or sensitive investigative techniques." US Br. 18. There is no citizen analogue to possession of such information; a normal citizen would not have access to it. Accordingly, speech involving such information would not have the protection of the First Amendment. There is no need to weaken *Garcetti* in such a circumstance by resorting to *Pickering* balancing; the "citizen analogue" inquiry provided in *Garcetti* is adequate on its own.

Likewise, application of the "citizen analogue" analysis renders unprotected the examples listed by Burrow as problematic: "police officers [who] routinely testify about traffic stops, arrests, or investigations; crime scene techni-

cians testify[ing] about processing evidence; and laboratory technicians testify[ing] about analyzing substances to confirm the presence of illegal drugs." Burrow Br. 23. There is no citizen analogue for such testimony. Similarly, testimony pursuant to Federal Rule of Civil Procedure 30(b)(6), *see* Burrow Br. 24, would not be protected as long as the testimony was confined to facts the witness was privy to only by virtue of his employment, but would be protected if the testimony, like the teacher's letter in *Pickering*, was based on opinion and ideas involved with the debate at issue.[4]

The *Garcetti* petitioners provided another illustrative example of why the "citizen analogue" inquiry is the correct approach. In their brief to this Court, they discussed "the unending efforts of this country's law enforcement and intelligence agencies to prepare against and to prevent another terrorist attack." *Garcetti v. Ceballos*, No. 04-473, 2005 WL 1317482, at *36-37 (May 27, 2005) (Petitioners' Br. on the Merits). They focused on the "communication (writ-

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[4] To the extent Lane or the amici argue that *Garcetti* should be overruled or curtailed for reasons related to academic freedom, the Court should decline to address that issue as it did in *Garcetti*: "speech related to scholarship" is not at issue in this appeal. *See* 547 U.S. at 425. The Court should leave that issue for another day when it is squarely presented.

ten or otherwise) regarding the effectiveness with which information is shared by this country's various intelligence agencies, between and amongst intelligence analysts employed by these agencies." *Id.* at *37. If such an analyst was subpoenaed to testify, Lane's approach would cloak any and all sensitive factual information testified to in the First Amendment. But under the "citizen analogue" approach, no citizen would be privy to such sensitive information, and, thus, it would not be protected. As the *Garcetti* petitioners wrote, such speech "should not be blanketed with constitutional protection because [it] lack[s] the essence of citizen speech that lies at the heart of the free speech clause of the First Amendment." *Id.*

In essence, Lane asks the Court to depart from the practical approach taken by *Garcetti* in the particular context of the subpoena, such that a government employee's subpoenaed testimony is always protected.[5] However, as noted, *Garcetti* itself contains everything the Court needs to address the question presented in the form of the "citizen analogue" lodestar. No "special justification" exists for such a departure. *See Dickerson v. United States*, 530 U.S. 428, 443 (2000) (citation and quotation marks omitted).

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[5] Even Burrow, who agrees with Lane on the outcome of the first issue, disagrees with this approach. Burrow Br. 21-27.

Lane will argue that the "citizen analogue" inquiry is equivalent to the subject matter of the government employee's employment, and that the Court held "the subject matter" of such employment "nondispositive." *Garcetti*, 547 U.S. at 421. While it is true that the subject matter of the employee's employment is nondispositive, that subject matter is not coextensive with the "citizen analogue" inquiry. Directly after the "nondispositive" statement in *Garcetti*, the Court stated that "[t]he First Amendment protects *some* expressions related to the speaker's job," *id.* (emphasis added), and cited *Pickering*. But, as shown above, the teacher's letter in *Pickering* did have a citizen analogue: "[T]he letter constituted, basically, an attack on the School Board's handling of the 1961 bond issue proposals and its subsequent allocation of financial resources between the schools' educational and athletic programs. It also charged the superintendent of schools with attempting to prevent teachers in the district from opposing or criticizing the proposed bond issue." 391 U.S. at 566. Any citizen could have written such a letter; Pickering's *opinion* on what he believed to be a mishandling of funds contributed to the public debate and, as such, was subjected to the balancing test articulated in *Pickering* and found protected by the First Amendment.

In direct contrast, there is no citizen analogue for Lane's speech, which consisted only of facts not available to a citizen, and which did not consist of opinion or debate. As such, and consistent with *Garcetti*, his speech was not protected by the First Amendment, and the Eleventh Circuit's decision should be affirmed.

II. Steve Franks Is Entitled to Qualified Immunity Because Neither the Court's Law nor Eleventh Circuit Law Clearly Established that Lane's Speech Was Protected, and the Law of Other Circuits Could Not Do So.

Franks has always denied and continues to deny that Lane's subpoenaed testimony had anything to do with the termination of Lane's employment. But even accepting as true that it did, and as the United States also acknowledges, "[b]ecause the constitutional status of [Lane]'s speech was not clearly established at the time of [his] dismissal, . . . Franks is entitled to qualified immunity from an award of damages in his individual capacity[,]" US Br. 7, which is the only claim against Franks at issue in this appeal.

It is axiomatic that "[q]ualified immunity shields government officials from civil damages liability unless the official violated a . . . constitutional right that was clearly established at the time of the challenged conduct." *Reichle v. How-*

ards, 132 S. Ct. 2088, 2093 (2012). This Court has held that "[t]o be clearly established, a right must be sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Id.* (citation and quotation marks omitted). While the Court does "not require a case directly on point, . . . existing precedent must have placed the . . . constitutional question beyond debate." *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2083 (2011). As in *Ashcroft*, "[t]he constitutional question in this case falls far short of that threshold." *Id.*

In determining whether Franks enjoys qualified immunity, "the salient question . . . is whether the state of the law [when Franks terminated Lane] gave [Franks] fair warning that [his] alleged treatment of [Lane] was unconstitutional." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). As shown, *supra* Section I, the state of this Court's law did not do so. Furthermore, the state of the Eleventh Circuit's law (which held the opposite) did not do so, either. Finally, the law of other circuits which directly contradicted Eleventh Circuit precedent did not and could not clearly establish law in the Eleventh Circuit.

A. This Court's Precedents Did Not Clearly Establish that Lane's Trial Testimony Was Protected.

To overcome a government official's qualified immunity, "the right allegedly violated must be established, not as a broad general proposition, but in a particularized sense so that the contours of the right are clear to a reasonable official . . . ." *Reichle*, 132 S. Ct. at 2094 (citations and quotation marks omitted).

Applying this law, Franks is entitled to qualified immunity because Lane has been unable to show that it was clearly established in January 2009, when Franks terminated Lane's employment, that Lane's testimony was citizen speech protected by the First Amendment. "Here, the right in question is not the general right to be free from retaliation for one's speech," *Reichle*, 132 S. Ct. at 2094, but the more specific right of a government employee to be free from retaliation on account of subpoenaed testimony. However, "[t]his Court has never held that there is such a right." *Id.* If it were to do so now, Franks would still have qualified immunity because, at the time of the challenged conduct, that right was not clearly established under this Court's or Eleventh Circuit precedent (*see infra* Section II.B). *See id.* at 2093-94.

Lane's reliance on the general law in *Garcetti* to argue that Franks is not entitled to qualified immunity is misplaced. In *Garcetti*, the Court *declined* to establish "a comprehensive framework for defining the scope of an employee's duties in cases where there is room for serious debate." 547 U.S. at 424. As the United States points out, while *Garcetti* "made clear that speech pursuant to an employee's official duties is unprotected, [it] did not address whether speech devoted exclusively to disclosing information learned through public employment falls within that unprotected category. Speech of that type was not before the Court in *Garcetti*." US Br. 29. Therefore, when Franks terminated Lane's employment "it was not clearly established that dismissing [him] for his testimony would violate [his] First Amendment rights. . . . Certainly *Garcetti* did not establish that proposition." *Id.* At the very least, "whether or not the constitutional rule applied by the court below was correct, it was not 'beyond debate.'"[6] *Stanton v. Sims*, 134 S. Ct. 3, 7 (2013) (citing *al-Kidd*, 131 S. Ct. at 2083).

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[6] That this was clearly not a settled issue is further shown by the multiple differing interpretations of *Garcetti* by Lane, Burrow, and the United States, in spite of their agreement that the Eleventh Circuit's decision was incorrect in this particular instance.

Lane's citations to multiple cases for the uncontroversial, general proposition that citizens have a duty to respond to a subpoena, a point which Franks does not dispute, are of no assistance to the Court. *See* Pet'rs Br. 22; *Reichle*, 132 S. Ct. at 2094. None of those cases establish that subpoenaed testimony is always protected speech. Only *Branzburg v. Hayes*, 408 U.S. 665 (1972), and *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991), discuss First Amendment jurisprudence at all, and then only in the unrelated context of a journalist's obligation to respond to a grand jury subpoena when confidential information or a confidential informant is involved. *See Reichle*, 132 S. Ct. at 2094. The United States put it best: "While those cases may establish the obligation of every citizen to testify when called, they do not clearly establish that every person who testifies invariably does so as a citizen, and not as an employee." US Br. 30.

Finally, Lane cannot overcome Franks' qualified immunity by finding "clearly established law lurking in the broad 'history and purposes of the F[irst] Amendment.'" *al-Kidd*, 131 S. Ct. at 2084 (citation omitted). The Court has repeatedly cautioned against defining clearly established law at such "a high level of generality." *Id.*; *see also* US Br. 29-30 ("Nor has any other decision of this Court, prior to or after *Garcetti*, conferred protection on speech consisting entire-

ly of information an employee learned through public employment.").

In short, regardless of how the Court rules on the First Amendment question, qualified immunity clearly bars Lane's action against Franks in his individual capacity.[7] *See, e.g.*, *al-Kidd*, 131 S. Ct. at 2085 ("Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions.").

B. Eleventh Circuit Precedent Did Not Clearly Establish that Lane's Speech Was Protected, But Actually Established Just the Opposite.

Qualified immunity also applies because, as correctly recognized by the Eleventh Circuit, far from placing the First Amendment issue "beyond debate[,]" *al-Kidd*, 131 S. Ct. at 2083, Eleventh Circuit precedent established the opposite of what Lane argues. *See* Pet. App. 5a-8a; *see also* Pet. 23 (acknowledging that "the Eleventh Circuit applied its precedent" in disposing of this action below).

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[7] A ruling in favor of Franks does not leave Lane without recourse if he can, in fact, prove at trial that he was terminated for his testimony, as there is still the possibility of injunctive relief against Burrow.

The Eleventh Circuit relied on its holding in *Morris v. Crow*, 142 F.3d 1379 (11th Cir. 1998), to hold that Franks was entitled to qualified immunity. Pet. App. 6a-8a. It determined that "*Morris* is the law in this Circuit on the question of public employee speech per a subpoena in the context of judicial proceedings." *Id.* at 7a n.3. The Eleventh Circuit recognized that in *Morris*, it held that because a police "officer's deposition testimony was given merely 'in compliance with a subpoena to testify truthfully' . . . and not as a 'public comment on sheriff's office policies and procedures, the internal workings of the department, the quality of its employees or upon any issue at all[,]' it was unprotected under the First Amendment." *Id.* at 6a-7a (citing *Morris*, 142 F.3d at 1382-83).

The Eleventh Circuit then applied that holding to the facts of this case to find that Lane's speech was not protected. *See id.* at 7a-8a. Franks quite obviously could not have known that his alleged action violated clearly established law, when a panel of three Eleventh Circuit judges applying Eleventh Circuit law held that it did not. *See, e.g.*, *Reichle*, 132 S. Ct. at 2097; *al-Kidd*, 131 S. Ct. at 2085; *see also* US Br. 30 ("Here, as the courts below recognized in petitioner's case, Eleventh Circuit law at the time of petitioner's dismissal did not clearly establish that his testimony was constitutionally protected, but instead pointed strongly to the

conclusion that testimony of this type was unprotected.").

In any event, Lane's attempt to distinguish the facts of this case from those in *Morris* fails. Like the officer in *Morris*, Lane made no attempt to comment on policies and procedures, internal workings, or the quality of employees. *See supra* pp. 6-8. He simply testified to the facts surrounding the personnel action he took regarding Schmitz. *See Morris*, 142 F.3d at 1382. This was not a case of "civic discussion," "public debate," or "dialogue" of any kind. *See supra* Section I. Nor can Lane show that the fact that he was testifying to the "truth" automatically meant, under clearly established law, that the speech was protected. *See Morris*, 142 F.3d at 1382 ("Nor is there any evidence that Morris gave deposition testimony for any reason other than in compliance with a subpoena to testify truthfully . . . .").

Furthermore, and as Lane concedes, Pet'rs Br. 38, neither *Martinez v. City of Opa-Locka*, 971 F.2d 708 (11th Cir. 1992), nor *Tindal v. Montgomery County Commission*, 32 F.3d 1535 (11th Cir. 1994), held that subpoenaed testimony is always protected. *See Hope*, 536 U.S. at 739 (relevant inquiry is whether unlawfulness of official's conduct is apparent in "light of pre-existing law"). Rather, those cases, both decided prior to *Morris*, held that testimony pursuant to subpoe-

na under the particular circumstances therein (a Board of Inquiry proceeding regarding the employer's purchasing practices and a co-employee sex discrimination/harassment trial) was protected speech. *See Tindal*, 32 F.3d at 1539-40; *Martinez*, 971 F.2d at 712. Several years later, and as discussed above, the Court found the exact opposite in *Morris*.

At most, Lane's reliance on *Martinez* and *Tindal*, and the parties' disagreement as to whether *Martinez* or *Morris* controls, highlights a discrepancy in pre-existing law as to whether testimony pursuant to a subpoena always constitutes protected speech. This only further shows that this was not a clearly established issue.[8]

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[8] The Eleventh Circuit has also highlighted this discrepancy:

> Indeed, while there is Eleventh Circuit precedent supporting the proposition that a public employee may have a First Amendment interest in testimonial communications made in the context of investigative proceedings, *see Martinez v. City of Opa-Locka*, 971 F.2d 708 (11th Cir. 1992), there is also . . . long-standing circuit precedent that not all communications on matters of general interest to the public enjoy First Amendment protection, even if those communications are made in the course of subpoenaed testimony. *See Morris*, 142 F.3d 1379.

The Eleventh Circuit did not err in finding that Franks was entitled to qualified immunity. *See Hope*, 536 U.S. at 739.

Lane's argument that "*Martinez* has never been overruled, and remains good law in the Eleventh Circuit" should be rejected. Pet'rs Br. 37. While Lane is correct that *Martinez* has never been explicitly overruled, the same is true for *Morris*, which was decided after *Martinez*, remains good law, and constitutes the Eleventh Circuit's most recent pronouncement on the issue of whether testimony pursuant to a subpoena is protected. Despite Lane's argument that *Morris* was wrongly decided, Pet'rs Br. 39, Franks was entitled to rely on that law and Lane cannot show otherwise.[9] *See Hope*, 536 U.S. at

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Green v. Barrett, 226 F. App'x 883, 886-87 (11th Cir. 2007).

[9] While Lane argues that Franks' reliance on *Abdur-Rahman v. Walker*, 567 F.3d 1278 (11th Cir. 2009), was misplaced because that case was decided after Franks acted, *Abdur-Rahman* simply reiterated what the clearly established law in the Eleventh Circuit was at the time Franks acted, *i.e.*, that speech that owed its existence to an employee's job responsibilities was not protected. *See* 567 F.3d at 1283; *see also* US Br. 32-33 ("Although *Abdur-Rahman* was decided several months after petitioner's dismissal, it confirms that reasonable jurists could disagree regarding whether, after *Garcetti*, speech devoted solely to conveying information learned in public employment qualified as unprotected employee speech.").

741 (standard for qualified immunity is "fair warning"); *see also* Burrow Br. 30-31 ("At the time of Lane's dismissal, Franks's home circuit had already rejected a First Amendment claim based on subpoenaed testimony about an employee's work activities. Even if that circuit-level precedent was wrongly decided, . . . the defense of qualified immunity does not require state officers to forecast the evolution of federal law."); *see also id.* at 33-34 ("A state officer cannot be expected to anticipate that this Court or a court of appeals will overrule a circuit precedent.").

Finally, Lane's argument that *Grand Jury Proceedings (Williams) v. United States*, 995 F.2d 1013 (11th Cir. 1993), and *Maggio v. Sipple*, 211 F.3d 1346 (11th Cir. 2000), are "relevant Eleventh Circuit cases support[ing] petitioner" is misleading. Pet'rs Br. 40-41. *Williams* did not discuss the First Amendment, and *Maggio*, while discussing the First Amendment, did not involve subpoenaed testimony. Even so, the *Maggio* court found that the individual defendants in that case were entitled to qualified immunity: "Because the analysis of First Amendment retaliation claims under the *Pickering-Connick* test involves legal determinations that are intensely fact-specific and do not lend themselves to clear, bright-line rules[,] a defendant in a First Amendment suit will only rarely be on notice that his actions are unlawful." 211 F.3d at 1354-55 (citation, quotations marks, and brackets

omitted). The same is true here and the Court should affirm Franks' qualified immunity from Lane's suit. *See Reichle*, 132 S. Ct. at 2097.

C. The Circuit Split Described by Lane in his Petition for a Writ of Certiorari Demonstrates that Franks is Entitled to Qualified Immunity.

Lane asked the Court to grant certiorari because the Eleventh Circuit's holding "conflicts with the precedents of at least three other federal circuits . . . ." Pet. 6. Now that the Court has accepted certiorari, Lane argues that Franks is not entitled to qualified immunity because he "should have known," based on the law of other circuits (despite his previous argument of a circuit split), that the law was clearly established. *See* Pet'rs Br. 41. Lane cannot have it both ways. His argument that this is not a settled issue among four circuits supports Franks' qualified immunity, even if the Court ultimately overrules the Eleventh Circuit's judgment on the First Amendment issue. *See Reichle*, 132 S. Ct. at 2097 (uncertainty in law, including appellate decisions that disagreed over the proper application of a Supreme Court case, supported officials' entitlement to qualified immunity); *Pearson v. Callahan*, 555 U.S. 223, 244-45 (2009) ("'If judges thus disagree on a constitutional question, it is unfair to subject [a defendant] to money damages for picking the losing side of the controver-

sy.'") (citation and brackets omitted); *Wilson v. Layne*, 526 U.S. 603, 617 (1999) ("Given such an undeveloped state of the law, the officers in this case cannot have been 'expected to predict the future course of constitutional law.'") (citation omitted) (discussing circuit split as supporting qualified immunity).[10]

Lane's argument that Franks should have looked to the Third Circuit's decision in *Reilly v. City of Atlantic City*, 532 F.3d 216 (3d Cir. 2008), where that court even acknowledged that it was "aware of no precedential appellate decision after *Garcetti* answering the question whether truthful trial testimony arising out of the employee's official responsibilities constitutes protected speech[,]" *id.* at 230, should be rejected.

Regardless, the law of another circuit could not clearly establish law in the Eleventh Circuit because the Eleventh Circuit had already addressed the issue in *Morris*. *See, e.g.*, *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) ("Under the established federal legal system the decisions of one circuit are not binding

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[10] Several amici, including the United States, also discuss and acknowledge the disagreement among the circuits on the First Amendment issue raised in this case. *See* US Br. 34-35; Alliance Defending Freedom Br. 3 (noting that "*Garcetti*'s broad job duties test has led to wide disagreement in the circuits").

on other circuits."); *In re Korean Air Lines Disaster of Sept. 1, 1983*, 829 F.2d 1171, 1176 (D.C. Cir. 1987) ("The federal courts . . . should strive to avoid conflicts, but each has an obligation to engage independently in reasoned analysis. Binding precedent for all is set only by the Supreme Court . . . ."). For the same reason, the Seventh Circuit's decisions in *Morales v. Jones*, 494 F.3d 590 (7th Cir. 2007), and *Fairley v. Fermaint*, 482 F.3d 897 (7th Cir. 2007), are irrelevant to the proper analysis of whether the law was clearly established in the Eleventh Circuit.

In sum, Franks is entitled to qualified immunity from Lane's money damages claim against him in his individual capacity regardless of what the Court holds on the merits of the First Amendment question.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the Eleventh Circuit in favor of respondent Steve Franks on both substantive and qualified immunity grounds.

Respectfully submitted,

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REPLY BRIEF

RECORD
AND
BRIEFS

No. 13-483

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IN THE

Supreme Court of the United States

EDWARD LANE,

Petitioner,

v.

STEVE FRANKS, IN HIS INDIVIDUAL CAPACITY, AND SUSAN BURROW, IN HER OFFICIAL CAPACITY AS ACTING PRESIDENT OF CENTRAL ALABAMA COMMUNITY COLLEGE,

Respondents.

On a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

This case asks whether the First Amendment permits the government to retaliate against a public employee for testifying truthfully in court on a matter of public concern—without making any showing that the testimony impaired the government's legitimate interests, and even when the employee testified under subpoena, and not pursuant to his job duties.

Respondent Franks has not cited a single case, prior to this one, in which a court held that the answer was "yes." The courts below reached that unprecedented result by ignoring this Court's rulings and cherry-picking snippets from inapposite circuit precedent. Franks defends those mistakes by wrenching language from *Garcetti v. Ceballos*, 547 U.S. 410 (2006), out of context, while ignoring the Court's actual rationale and holding.

Perhaps the clearest evidence of the magnitude of the lower courts' error is that the Solicitors General of both the United States and Alabama—two sovereigns that face increased liability if the Court rules in petitioner's favor—argue that the First Amendment protects petitioner's testimony. They are joined by a diverse and impressive array of *amici*, including scholarly commentators and advocacy organizations across the ideological spectrum.[1]

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[1] This consensus stands in contrast with the lone *amicus* brief supporting respondent Franks, which waxes nostalgic about the days before this Court decided *Pickering v. Board of Education*, 391 U.S. 563 (1968), and takes the extreme view that all speech "related to the performance of one's job duties" is unprotected because that speech "owes its existence" to the

The well-founded and overwhelming consensus supporting petitioner on the merits also supports his claim that qualified immunity does not protect Franks from liability for damages. This Court's holdings clearly establish that the First Amendment applies because petitioner spoke as a citizen on a matter of public concern. To the extent that circuit decisions are inconsistent with that rule, those decisions are contrary to this Court's clear precedents and cannot support immunity. But in fact, circuit precedent also supports petitioner.

This Court should accordingly hold that the First Amendment protects petitioner's truthful testimony, and that this rule was clearly established at the time Franks fired him for that testimony.

I. Respondent Franks' Recitation Of The Facts Is Irrelevant And Misleading.

Franks begins (Br. 4-14) with a slanted reading of the facts insinuating that petitioner's termination was not retaliatory. These contentions are irrelevant to the questions presented, which do not turn on Franks'

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employee's job. Br. of Int'l Municipal Lawyers Ass'n 14-15. That, of course, is incompatible with *Garcetti*'s statement that "[t]he First Amendment protects some expressions related to the speaker's job," 547 U.S. at 421. Moreover, that reading of the phrase "owes its existence" was debunked in petitioner's brief (at 31-34), respondent Burrow's brief (at 18-19), the brief of the United States (at 15-16), the National Education Association's brief (at 12-13), and the law professors' brief (at 10-12). Indeed, even Franks disclaims reliance on that language. Franks Br. 32.

motivations, but instead on the nature of petitioner's speech. If anything, that section of Franks' brief is an implicit acknowledgment that retaliation against petitioner's testimony would have been improper.

This Court must decide this case—which was adjudicated on summary judgment—on the facts in the light most favorable to petitioner. Applying that standard, even the district court, which ruled broadly in Franks' favor, held that "genuine issues of material fact exist in this case concerning Dr. Franks' true motivation for terminating Mr. Lane's employment," so that summary judgment was inappropriate on that ground. Pet. App. 21a.

Petitioner's version of the facts, supported by substantial evidence, is that before he took the position as director of CITY, two prior directors had taken no action against Schmitz as she bilked the program via a no-show job she had arranged through powerful political allies. Notwithstanding warnings that Schmitz might retaliate, petitioner terminated her, prompting her to tell a colleague that she intended to "get [petitioner] back" and that if petitioner ever sought further funding for CITY from the legislature, she would see him fired. *Id.* 2a, 11a.

Petitioner then accurately described Schmitz's culpable conduct to the grand jury and at Schmitz's criminal trials. Franks knew about petitioner's testimony. *Id.* 17a. Then, petitioner was terminated along with twenty-eight other employees—however all but petitioner and one other were promptly rehired. *Id.* 3a. That termination occurred just before CITY's budget was due for consideration at the legislature,

and petitioner argues that he was fired either in collaboration with, or in response to pressure from, Schmitz's political allies. *Id.* 17a,

Franks claims that he knew very little about these events, and that ultimately, petitioner's termination was a financial decision, not retaliation. On summary judgment, that claim must fail because a jury is entitled to believe the far more plausible account that Franks realized that petitioner's testimony had angered and embarrassed Schmitz (who at that time had secured a hung jury) and her allies, and he fired petitioner in order to appease those people. If this Court resolves the questions presented in petitioner's favor, it should leave these issues to the lower courts on remand—and Franks does not ask otherwise.

II. The First Amendment Protects Petitioner's Testimony.

Franks argues next (Br. 27-30) that the First Amendment does not protect petitioner's speech because his testimony has no "citizen analogue." Franks never contends that petitioner's job duties—whether as formally stated, or as practically performed—included testifying in court. Instead, he argues that because the facts to which petitioner testified were only knowable by a public employee, the Court should hold that petitioner effectively spoke pursuant to his official duties.

Franks' rule misreads *Garcetti*. Moreover, by giving the government carte blanche to fire employees in retaliation for publicly discussing information they learned at work, Franks' rule shrouds the operation of

the government in near-total secrecy, undermining the principal benefit of public employee speech—knowledgeable statements that contribute unique insights to public dialogue.

In *Garcetti*, this Court recognized a limitation on the general rule—established by *Pickering* and its progeny—that when a public employee speaks on a matter of public concern, the First Amendment protects his speech. The limitation is that this protection does not apply "when public employees make statements pursuant to their official duties." 547 U.S. at 421. This rule "reflects the exercise of employer control over what the employer itself has commissioned or created," and thus affords "government employers sufficient discretion to manage their operations." *Id.* at 422. In other words, the government has a right to evaluate employee "work product," and the First Amendment does not undermine that right when the work product constitutes speech. *Id.*

As an aside, the Court addressed what the Ninth Circuit "perceived as a doctrinal anomaly." *Id.* at 423. The court of appeals had reasoned that the First Amendment must protect speech "report[ing] official misconduct," even if reported internally pursuant to the employee's official duties, because a contrary result would create incentives for government employees to air their employers' dirty laundry to the public. *Ceballos v. Garcetti*, 361 F.3d 1168, 1176 (9th Cir. 2004). This Court rejected that logic, reasoning that the goal of public employee speech doctrine is not to maximize internal reporting, but instead to ensure

that public employees retain the rights of citizenship. Thus, the Court explained:

> Employees who make public statements outside the course of performing their official duties retain some possibility of First Amendment protection because that is the kind of activity engaged in by citizens who do not work for the government. . . . When a public employee speaks pursuant to employment responsibilities, however, there is no relevant analogue to speech by citizens who are not government employees.

547 U.S. at 423-24.

Franks takes this Court's rejoinder to the Ninth Circuit and runs with it, arguing that *Garcetti* in fact created a dispositive "citizen analogue inquiry," and that petitioner's testimony fails that test because no private citizen would have known the facts to which petitioner testified. Franks also argues (at 3-4, 19-20) that the "citizen analogue" inquiry encompasses whether the speech is at the "heart of the First Amendment"—which he defines narrowly to include "ideas and opinion"—or instead at the periphery—which he defines to include all statements of fact, including testimony.

Franks' contention is incorrect on every level. First, there is no independent "citizen analogue" inquiry. The question is whether the employee spoke pursuant to his duties, determined using a "practical" inquiry identifying "the duties an employee actually is expected to perform." *Garcetti*, 547 U.S. at 424-25.

That rule follows from the premise that employers have a right to control employees' performance. Franks' "citizen analogue" inquiry, by contrast, fails to identify speech that the employer has a legitimate interest in controlling, and instead protects speech—or not—based on a court's ad hoc assessment of whether that speech conforms to some amorphous notion of core citizen speech.

To the extent that a "citizen analogue" test might exist, *Garcetti* never suggested that speech would lose protection merely because it describes facts that the employee learned at work. Indeed, the entire premise of this Court's response to the Ninth Circuit, upon which Franks relies, is that employees would learn about wrongdoing during the course of their employment and report it; the Court stated that the First Amendment only protected such reports made externally—not that the speech was unprotected altogether because it conveyed insider information. *Id.* at 423-24. Indeed, the Court expressly disclaimed any knowledge-based test. *See, e.g.*, *id.* at 421 ("The First Amendment protects some expressions related to the speaker's job.") (citing *Pickering v. Bd. of Educ.*, 391 U.S. 563, 573 (1968), and *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 414 (1979)). This is because society has a First Amendment interest in hearing the informed views of public employees, and any rule denying protection to revelations of nonpublic information learned at work would undermine that interest. *See id.*

Moreover, ambiguities in Franks' rule ensure that it would inject substantial uncertainty and confusion

into First Amendment cases. Franks argues that petitioner's testimony is unprotected because it "(1) was entirely based on information not available to citizens, (2) was merely factual in nature, and (3) did not consist of the kind of 'ideas and opinion' speech found in debate or advocacy." Franks Br. 3. But assume that petitioner had revealed Schmitz's corruption in a letter to the editor of a local newspaper instead of sworn testimony. Would the nature of the information mean that his letter had no citizen analogue? Or would the fact that "numerous citizens every day" write letters to the editor, *Garcetti*, 547 U.S. at 422, mean the opposite? Or assume that only half of petitioner's testimony comprised facts that he learned at work, and the rest discussed facts that non-employees also knew. What if petitioner's factual testimony verified an uninformed conspiracy theory published on the Internet? What if petitioner supplemented his factual statements with vociferous statements of opinion? Or a single, muted statement of opinion? And what does it mean for information to be unavailable to citizens? What if citizens could learn that information by making a phone call and asking, or by filing an official request for public records? What if a public employee had shared relevant information with family, a union representative, or her attorney? Franks' explanation answers none of these questions, and this Court's precedents—which have never purported to apply Franks' test—likewise do not fill in the blanks.

Although Franks never acknowledges it, these ambiguities cast a shadow over this very case. At Schmitz's trial, the government called multiple

witnesses who were not CITY employees, but who nevertheless knew of Schmitz's misdeeds and of petitioner's decision to fire her. Foremost among these was Mary Ogles, the Assistant Executive Secretary for the Alabama Education Association, a professional organization that assisted Schmitz in her interactions with petitioner. Ogles attended the meeting at which petitioner fired Schmitz, and she testified regarding that meeting, as well as the events that preceded it, in detail. *See* Trial Transcript 122-26, 139-144, *United States v. Schmitz*, No. 08-cr-14-RDP-PWG, ECF No. 118 (N.D. Ala. Nov. 24, 2008). Petitioner likewise testified that before firing Schmitz, he told Ogles the relevant details regarding Schmitz's failure to perform her duties. *See id.* at 184-85. By that point, Ogles—a private citizen—knew most of what petitioner knew. And she was not the only non-employee who testified against Schmitz. *See id.* at 63-64, 67-70 (lobbyist testifies that Schmitz was attending a conference on days she had claimed to be working); Trial Transcript 258-61, 266, *United States v. Schmitz*, No. 08-cr-14-RDP-PWG, ECF No. 117 (N.D. Ala. Nov. 24, 2008) (high school principal testifies that Schmitz was volunteering at the school on days she had claimed to have been working); *id.* at 78, 111-17 (two employees of Northrop Grumman testify that Schmitz had not meaningfully interacted with them in their charitable efforts or their work in creating CITY's website). The defense likewise called non-employee witnesses.

Franks never discusses any of this testimony, nor explains what information petitioner had that these citizens did not, so it is unclear how his "citizen analogue" rule functions.

In addition to highlighting the difficulties inherent in Franks' rule, these examples of citizen testimony in the Schmitz trial also demonstrate that there is an obvious "citizen analogue" to subpoenaed testimony by public employees: subpoenaed testimony by other citizens. Just as citizens write letters to editors every day, they testify every day, contributing their knowledge to the judicial system's search for truth. That is one reason why this Court has repeatedly described subpoenaed testimony as an obligation of citizenship. Petitioner's speech was therefore not pursuant to his official duties, even if that question could be resolved solely by asking whether he engaged in speech that resembles speech by other citizens.

Indeed, there is no need to resort to analogies at all, because petitioner *himself* was subpoenaed in his capacity as a citizen. Franks never disputes that petitioner testified as an individual, that the burdens of compliance fell on him as an individual, and that CITY had no legitimate interest in controlling the content of his testimony. Those facts are far more probative than whether petitioner's speech can be analogized to testimony by private citizens.

Two additional points bear brief mention. First, to the extent Franks believes that statements of opinion are entitled to greater First Amendment protection than truthful factual statements, he is wrong. *See, e.g.*, *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 640 n.9 (1985); *Rumsfeld v. Forum for Academic & Inst. Rights, Inc.*, 547 U.S. 47, 62 (2006). Indeed, this Court has recognized strong First Amendment protection for *false* factual statements—

and it would be highly anomalous if similar protection did not extend to true ones. *See, e.g.*, *United States v. Alvarez*, 132 S. Ct. 2537, 2544-45 (2012); *Garrison v. Louisiana*, 379 U.S. 64, 78 (1964). Similarly, that petitioner testified in litigation does not diminish the public value of his speech—especially when, as here, the subject matter of petitioner's testimony is undisputedly of public concern. In *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2500 (2011), this Court explained that "[t]he government may not misuse its role as employer unduly to distort" the "deliberative process" of litigation. "Just as the public has a right to hear the views of public employees, the public has a right to the benefit of those employees' participation in [lawsuits]," including when that participation contributes to "the public airing of disputed facts." *Id.* (quotation marks and citation omitted).

Second, Franks warns (at 26 & n.3) that if his version of the "citizen analogue" test is not adopted, public employers will have insufficient recourse against employees who divulge confidential information. This is naked scaremongering. This case does not present any secrecy concerns because petitioner was not asked to—and did not—reveal any secrets. Even had that not been the case, courts supervising testimony possess tools, including protective orders, to address legitimate secrecy concerns. Finally, as the United States explains (at18), *Pickering* balancing resolves this issue in the rare event of an improper disclosure. When employees improperly disclose confidential information, the risk of disruption will ordinarily justify employer discipline. *Pickering* balancing allows the courts to

address those circumstances as they arise. Franks' rule, by contrast, bluntly denies First Amendment protection even when speech does not raise legitimate secrecy concerns.

III. A Bright-Line Rule Protecting Subpoenaed Testimony Is Desirable, But Not Necessary.

Franks and Burrow argue that the Court should not adopt a categorical rule that the First Amendment always applies to subpoenaed testimony. To be clear, petitioner agrees that no such rule is *necessary* to decide this case. Under a straightforward application of this Court's clearly established public employee speech doctrine, petitioner prevails because he spoke as a citizen on a matter of public concern. The Court can end the inquiry there without pronouncing more broadly on the nature of subpoenaed testimony.

However, a broader rule recognizing First Amendment protection for subpoenaed testimony on matters of public concern would be desirable, because it would facilitate the judicial system's search for truth and thus uphold society's First Amendment interest in hearing public employees' valuable speech. Moreover, there is no downside to holding that the First Amendment applies because *Pickering* balancing protects employers from unduly disruptive testimony, while preventing the government from using its power as an employer to distort the truth-seeking function of the judicial process.

The marginal cases under a broader rule involve public officials who testify regularly pursuant to their

duties—including police officers and lab technicians. An argument could be made that even when such employees testify under subpoena, they are speaking pursuant to their official duties, so that the First Amendment does not apply.

But that is not correct. When an employee testifies, his oath to the court creates an obligation—independent of any obligation to his employer—to testify truthfully. Thus, it is more accurate to say that the witness simultaneously speaks as an employee *and* as a citizen. The question is therefore not which role the witness occupies, but which role takes precedence.

This Court should hold that the First Amendment applies because the witness's role as a citizen takes precedence. That is because in the event of a conflict, the judicial system's interest in discovering the truth must prevail over the employer's parochial interest in achieving a favorable litigation outcome. Of course, if the employer determines that a public employee testified poorly for some reason other than the government's disagreement with the content of his truthful speech—for example, if the testimony is false or discloses confidential information—then *Pickering* requires the courts to defer to the employer's assessment that discipline is warranted.

To reiterate, the Court need not opine on all testimony in order to resolve this case. Here, petitioner's job responsibilities—as formally stated and as practically applied—did not include testifying in Schmitz's trial. Consequently, this case bears no resemblance to the hard cases in which an employee arguably testifies pursuant to his duties, and under

this Court's precedents, Franks' conduct was clearly unconstitutional. But that more difficult fact pattern arises often, and it would be consistent with this Court's precedents to clarify that in those cases, the First Amendment applies.

IV. Franks Is Not Entitled To Qualified Immunity.

The final issue is qualified immunity. Respondent Franks confuses the inquiry by suggesting that qualified immunity protects him unless the law clearly established the "right of a government employee to be free from retaliation on account of subpoenaed testimony," Franks Br. 39, suggesting that petitioner must prove that *all* subpoenaed testimony is *always* protected. As the previous section demonstrates, the Court need not go so far in order to hold that petitioner's right to testify was clearly established. On the contrary, the only proposition that had to be clearly established was that when an employee testifies on a matter of public concern—and not because his job duties require him to do so—he speaks as a citizen, even if his testimony describes events that occurred at work. Applying this standard when petitioner was fired in 2009, the controlling precedents of this Court and the Eleventh Circuit both established petitioner's right to testify.

1. Under *Garcetti*, decided well before Franks fired petitioner, when an employee's speech relates to a matter of public concern, the scope of the employee's duties is dispositive: the First Amendment applies to speech made outside those duties, but not within them. Courts must determine the scope of the

employee's duties using a "practical" inquiry that seeks to identify "the duties an employee actually is expected to perform." 547 U.S. at 424-25. That focus on actual duties is why employers cannot draft "excessively broad job descriptions" in order to "restrict employees' rights." *Id.* at 425. *Garcetti* also expressly stated that "[t]he First Amendment protects some expression related to the speaker's job," so that even if speech "concern[s] the subject matter of [the] employment," that "is nondispositive." *Id.* at 421.

Petitioner's actual duties were to manage CITY's day-to-day operations, staff, and budget. Pet. App. 10a. Those duties never required him to testify in court. *See id.* 7a. Thus, he did not regularly, or even occasionally, appear in court for work, and his job description did not suggest that he ever would. He testified in the Schmitz prosecution because he was subpoenaed as an individual to speak about whether Schmitz had committed fraud. Under a straightforward application of *Garcetti*, then, petitioner's speech is citizen speech. That rule was clearly established in 2006, and Franks had no justification to ignore it in 2009.

Garcetti's reasoning likewise compels the conclusion that petitioner's speech is protected. The Court focused on whether the employee was performing his duties such that his employer had a right to evaluate his performance by disciplining him for speech with which it disagreed. Nobody—including Franks himself—has argued that Franks had any right to control petitioner's testimony. Moreover, *Garcetti* emphasized that "the First Amendment

interests at stake" include "the public's interest in receiving the well-informed views of government employees engaging in civic discussion." 547 U.S. at 419. Petitioner's testimony vindicated this interest by providing the public with truthful, important information. Finally, *Garcetti* put Franks on notice that petitioner's testimony was entitled to greater protection than the memorandum in that case. Justice Souter's *Garcetti* dissent noted that the court of appeals had not reached the issue of Ceballos' sworn testimony. *See id.* at 443-44 (Souter, J., dissenting). It then argued, without contradiction, that Ceballos' "claim relating to truthful testimony in court must surely be analyzed independently to protect the integrity of the judicial process." *Id.* at 444.

Thus, both the holding of *Garcetti* and its rationale support a finding that petitioner's speech was protected. And of course, *Garcetti* should be read in context. That case came at the end of a long line of cases starting with *Pickering*, all of which focused on whether the speech related to a matter of public concern—which is undisputed in this case. This Court has never denied protection to such speech because it described facts learned at work, nor has it suggested that another court could do so.

In the face of this clear authority, respondents and the United States focus on what *Garcetti* did not decide, and attempt to argue that the Court left room for other tests that might support a different result.

The United States and Franks both make a single argument about *Garcetti*: that it "did not address whether speech devoted exclusively to disclosing

information learned through public employment" was unprotected, and therefore did not clearly establish petitioner's right to testify. U.S. Br. 29; Franks Br. 40. That is incorrect. Indeed, one need only look thirteen pages earlier in the United States' brief, which accurately recognizes:

> The scope of the Court's holding in *Garcetti* is especially clear in its guidance regarding how to determine whether speech is pursuant to employment duties. To ascertain whether speech was outside the scope of the First Amendment as employee speech, the Court called for a "practical" inquiry into "the duties an employee actually is expected to perform." 547 U.S. at 424-425. By directing courts to focus on employees' job duties, rather than the basis of employees' knowledge, the Court made clear that *Garcetti*'s holding did not extend as far as the Eleventh Circuit believed.

U.S. Br. 16. Petitioner agrees with the United States that *Garcetti*'s holding was "especially clear" in rejecting the proposition that "the basis of employees' knowledge" was relevant to the "practical inquiry" necessary to determine the scope of employees' duties. Thus, even if petitioner's testimony "disclos[ed] information learned through public employment," *Garcetti* still "clear[ly]" holds the speech protected if it was not itself made pursuant to his duties.

The United States may attempt to reconcile its statements with the following sentence: "While *Pickering* and subsequent cases treated speech as protected when employees expressed views that were

informed by their government positions, none of those cases addressed speech that simply relayed information about acts performed as part of a speaker's official duties." U.S. Br. 30. The attempt fails, however, as a matter of both legal principle and application.

First, the distinction between speech "informed by" government employment and speech that "relayed information" about government employment is contrived and illusory—akin to saying that because the *Pickering* line of cases did not expressly hold that speech made on Tuesdays is protected, it left room for a reasonable public official to conclude otherwise. *Garcetti* plainly stated that the First Amendment protects employees' speech, even if that speech "concerned the subject matter" of their employment, as long as it also related to a matter of public concern, and was not made "pursuant to their official duties." 547 U.S. at 421. This Court has never suggested that within this category of protected speech, there is some special sub-category of statements insulated from the First Amendment because they relate *only* to the subject matter of the employee's job.

Indeed, such a distinction would be arbitrary, in the same way that Franks' formulation of the "citizen analogue" test is arbitrary. Imagine a statement comprising ten sentences of text, nine of which related facts that the employee learned at work, and one of which offered a political opinion. There would be no reasonable basis for treating such a statement differently from a statement that only offered the factual description, especially in light of the

government's argument that "[t]he fact that there was no evidence that petitioner intended to give public commentary—rather than simply to fulfill the requirements of a subpoena—has no relevance to this analysis." U.S. Br. 8-9.

Second, even assuming that there is a coherent category of statements that "simply relayed information about acts performed as part of a speaker's official duties," that category would not include petitioner's testimony. When petitioner testified, he described his actions to establish a foundation for the substance of his testimony, which was a description of Schmitz's culpable conduct, *i.e.*, her refusal to work, and her insistence that her political role and connections nevertheless entitled her to a job. Petitioner was not on trial, and it was his testimony regarding *Schmitz's* actions—and not "acts [he] performed"—that mattered. That is the testimony the government sought, and that is the testimony that precipitated the retaliation in this case.[2]

The United States attempts to distinguish this Court's precedents establishing that subpoenaed testimony is a citizen's duty by arguing that "[w]hile those cases may establish the obligation of every citizen to testify when called, they do not clearly establish that every person who testifies invariably

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[2] For the same reason, petitioner disputes the Eleventh Circuit's characterization that his "testimony touched only on acts he performed as part of his official duties." Pet. App. 7a. Of course his testimony discussed those acts, but not exclusively.

does so as a citizen, and not as an employee." U.S. Br. 30. This states the point at too high a level of generality. The question is not whether these cases establish that every person who ever testifies does so as a citizen. The question is whether, in light of these cases, a reasonable official in Franks' position could conclude that petitioner did *not* testify as a citizen. He could not. Petitioner was summoned by a federal court, not his employer. The subpoena was addressed to him as an individual, and not as director of CITY. The consequences of noncompliance fell on him personally, and not on his employer, or anybody else. And he spent time away from the office to testify. This Court's cases analyzing similar subpoenas have held that regardless of a witness's employment—whether as a journalist or as President of the United States—the witness must give his evidence for the benefit of the public, because he is obligated, as a citizen, to do so. *See United States v. Nixon*, 418 U.S. 683, 709 (1974); *Branzburg v. Hayes*, 408 U.S. 665, 690 (1972). Because petitioner was fulfilling that obligation when he testified, his speech is properly—and irrefutably—characterized as citizen speech.

2. Respondent Burrow does not argue that this Court's precedents left any room for Franks to retaliate against petitioner. She argues instead (joined by Franks and the United States) that Eleventh Circuit precedent sanctioned Franks' retaliation, thereby giving rise to qualified immunity even though this Court's precedents would not. Burrow Br. 30-31.

A rule permitting public officials to ignore this Court's precedents in favor of wrongly decided circuit precedent would be highly dubious—especially in the personnel context. Franks was not a police officer making split-second decisions in the field; he was a university administrator who had ample time to consult counsel and confirm the law. To the extent that Eleventh Circuit precedent was inconsistent with this Court's holdings, he should have conformed his conduct to this Court's holdings. That is what a reasonable public official would have done, as it is common knowledge that this Court's precedents trump contrary circuit precedent. *See Hope v. Pelzer*, 536 U.S. 730, 747-48 (2002) (explaining that in qualified immunity, "the significance of federal judicial precedent is a function in part of the Judiciary's structure," such that reliance on lower court decisions is unjustified in the face of contrary higher authority).

Even assuming that wrongly decided circuit precedent could create qualified immunity, that precedent must, at least, be on point. Certainly, a public official cannot pluck snippets from inapposite cases in order to justify unconstitutional conduct, when more clearly relevant circuit precedent compels a contrary result.

But that is exactly what respondents attempt here. In his opening brief (at 38-41), petitioner explained that this case does not resemble *Morris v. Crow*, 142 F.3d 1379 (11th Cir. 1998) (per curiam), which involved a closed-door civil deposition in a wrongful death case, where the employee merely described the contents of a car accident report he had

prepared at work. *Morris* stands for the proposition that when speech does *not* relate to a matter of public concern, "[t]he mere fact that [the] statements were made in the context of a civil deposition cannot transform them into constitutionally protected speech." *Id.* at 1383. It does not speak to cases, like this one, in which the testimony itself described public corruption—a class of speech at the heart of the First Amendment.

Morris itself ruled around circuit precedent. The most important case is *Martinez v. City of Opa-Locka*, 971 F.2d 708 (11th Cir. 1992). In *Martinez*, the director of the city purchasing department testified under subpoena before the city commission, which sat as a board of inquiry, *i.e.*, as a disciplinary body, reviewing the activities of the city manager. *Id.* at 710. Martinez testified that the city manager had violated city bid procedures, and thus misused public funds. *Id.* She was fired, and brought a suit for retaliation. The court of appeals held that her testimony addressed a matter of public concern because "[s]peech that concerns 'issues about which information is needed or appropriate to enable the members of society' to make informed decisions about the operation of their government merits the highest degree of first amendment protection." *Id.* at 712 (quotation marks and citation omitted). Of course, Martinez learned the facts to which she testified in the course of her employment as director of purchasing. If that were enough to eliminate First Amendment protection, her speech could not have been protected.

Morris characterized the statements in *Martinez* as follows:

> Testimony was speech that clearly affected matter of public concern where statements involved public funds spent in violation of city ordinance, were in the form of testimony before city's legislative body and statements to an investigator with state attorney's office, and were made in the context of an examination into activities of city personnel.

142 F.3d at 1383. This description, of course, applies with equal or greater force to petitioner's testimony. His speech revealed violations of criminal laws, was in the form of testimony before a federal grand jury and court, and was made in the context of a federal prosecution. There simply is no basis upon which a reasonable public official could have concluded that *Morris* somehow justified retaliating against petitioner's testimony in light of *Martinez*.

Respondent Burrow, like the Eleventh Circuit below, does not even mention *Martinez*. That failure discredits her analysis. In the Eleventh Circuit, panel decisions are controlling unless overruled, *see United States v. Hogan*, 986 F.2d 1364, 1370 (11th Cir. 1993), and *Martinez* has never been overruled. Thus, to the extent that *Morris* is inconsistent with *Martinez*, *Martinez* controls. But of course, the better approach is to reconcile the cases, *see id.*, and there is no reasonable way to do so and nevertheless conclude that retaliation was justified here. Both cases involved subpoenas, and both cases involved testimony disclosing information learned by public employees at

work. Thus, neither of these factors gives rise to a distinction. The critical difference is the subject matter and the context of the testimony: *Martinez*, like this case, involved allegations of corruption aired in a grand jury investigation and a public trial; *Morris* involved allegations of bad driving in a closed-door civil deposition. Thus, no reasonable public official could decide that *Morris* controlled.

Respondents are also wrong to argue that the existence of a circuit split, or the lower courts' holdings in this case, are sufficient to support immunity. In this regard, the character of the split is important. The Third and Seventh Circuits had expressly held, after *Garcetti*, and before petitioner was terminated, that the First Amendment protects subpoenaed testimony exposing official misconduct. Prior to this case, the Eleventh Circuit had not reached a contrary result. It did so here by extending inapposite circuit precedent to protect egregious misconduct.

This case therefore resembles to those in which this Court found no immunity even though the defendants had obtained favorable rulings below. In *Groh v. Ramirez*, 540 U.S. 551, 555-56 (2004), when officers failed to comply with the Fourth Amendment's warrant requirement, the district court held that there had been no Fourth Amendment violation at all, and in the alternative that qualified immunity applied. This Court disagreed, explaining that when the warrant was facially deficient, a violation was clear and immunity did not shield the officers. *See id.* at 564-65. In *Hope*, this Court held that the practice of handcuffing inmates to a hitching post was clearly

unlawful even after the Eleventh Circuit had granted qualified immunity to the officials who had done so. 536 U.S. at 745.

The notion that state officials can retaliate against federal witnesses for their subpoenaed testimony in a corruption prosecution is every bit as egregious as the idea that an officer could execute a facially deficient warrant, or secure an inmate to a hitching post. Retaliation against petitioner's testimony is an affront to both the First Amendment and the judicial system, and no reasonable official could have thought otherwise.

CONCLUSION

For the foregoing reasons, the judgment of the Eleventh Circuit should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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In the Supreme Court of the United States

EDWARD R. LANE, PETITIONER

v.

STEVE FRANKS, IN HIS INDIVIDUAL CAPACITY, AND SUSAN BURROW, IN HER OFFICIAL CAPACITY AS ACTING PRESIDENT OF CENTRAL ALABAMA COMMUNITY COLLEGE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING AFFIRMANCE IN PART AND REVERSAL IN PART

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QUESTIONS PRESENTED

1. Whether the First Amendment affords protection to a public employee who has been compelled by subpoena to provide sworn testimony concerning facts related to his employment.

2. Whether, if the First Amendment provides such protection, qualified immunity precludes an award of damages because the First Amendment right was not clearly established at the time that petitioner was dismissed.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING AFFIRMANCE IN PART AND REVERSAL IN PART

INTEREST OF THE UNITED STATES

This case presents the question whether the First Amendment protects a public employee who testifies before a federal grand jury and at a federal criminal trial when the testimony concerns information learned through the employee's public employment. The United States is both the nation's largest public employer and the principal enforcer of federal civil and criminal laws. Accordingly, the United States has interests both in ensuring that all citizens provide truthful testimony in federal proceedings and in ensuring that public employers may manage their work-

places efficiently. The United States therefore has a substantial interest in this question.

This case also presents the question whether respondent was entitled to qualified immunity on the ground that it was not clearly established that the First Amendment prohibited petitioner's employer from firing petitioner for his testimony regarding information learned through public employment. Because the Court's resolution of that question may affect federal officials' entitlement to qualified immunity in actions pursuant to *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the United States has a substantial interest in the resolution of this question.

STATEMENT

1. In 2006, petitioner Edward Lane became director of Community Intensive Training for Youth (CITY), a financially troubled program for at-risk youth operated by Central Alabama Community College (CACC). Pet. App. 2a, 10a-11a. The appointment was probationary. *Id.* at 10a. As director—the highest-ranking employee at CITY—petitioner's responsibilities included hiring and firing employees, making financial decisions, and overseeing the program's day-to-day operations. *Ibid.*

When petitioner became director of CITY, he began an audit of the program's finances. Pet. App. 2a, 11a. During the audit, petitioner learned that Suzanne Schmitz, an Alabama State Representative, was on the payroll but was not reporting for work. *Ibid.* He raised the issue with the then-president of CACC and with the college's lawyer, who warned him that firing Schmitz could have negative repercussions for petitioner and for the college. *Ibid.* After Schmitz

refused to show up to work, however, Lane fired her. *Ibid.* Schmitz then told another CITY employee that she intended to "get [petitioner] back" and that if petitioner asked for money from the state legislature, she would tell him, "[y]ou're fired." *Ibid.*

Soon after petitioner fired Schmitz, the Federal Bureau of Investigation (FBI) began a criminal investigation of Schmitz's no-show employment. Pet. App. 2a. The FBI sought information from petitioner, who testified before a federal grand jury in November 2006. *Id.* at 2a, 12a. In January 2008, the grand jury indicted Schmitz on four counts of wire fraud and four counts of theft concerning a program receiving federal funds. See *United States* v. *Schmitz*, 634 F.3d 1247, 1256-1257 (11th Cir. 2011).

Petitioner was one of a number of CITY employees called to testify at Schmitz's trial in August 2008. Pet. App. 2a-3a, 12a; see *Schmitz*, 634 F.3d at 1253-1256 (describing trial evidence). Petitioner's testimony, which he gave pursuant to subpoena, concerned information that petitioner learned while performing his duties as director of the CITY program. Pet. App. 3a. Petitioner described how Schmitz had failed to show up to work; failed to submit time sheets; and failed to comply with petitioner's direction to begin reporting daily to CITY's Huntsville office. *Id.* at 3a, 13a. He also described how Schmitz had told petitioner that she had gotten her job through connections. *Id.* at 3a. After the jury at Schmitz's first trial failed to reach a verdict, petitioner testified to these facts again at a retrial in February 2009. *Id.* at 3a, 13a. Schmitz was convicted of mail fraud and other charges. See *Schmitz*, 634 F.3d at 1251.

Respondent Steve Franks became president of CACC in January 2008. Pet. App. 13a. Petitioner advised Franks in November 2008 of CITY's budget problems and recommended a reduction in force. *Ibid.* By the end of that year, CITY was in danger of failing to meet its payroll due to its financial problems. *Id.* at 13a-14a. Franks accepted the recommendation of a reduction in force and, according to respondents, decided to terminate all probationary employees. *Id.* at 14a. In January 2009, Franks sent termination letters to petitioner and 28 other employees who had fewer than three years of service with the program. *Id.* at 3a. One of the remaining CITY employees was named interim director. *Id.* at 15a-16a.

A few days later, however, Franks rescinded all of the terminations except for those of petitioner and one other employee—a decision that Franks explained occurred after Franks discovered that those employees were not, in fact, probationary. Pet. App. 3a-4a, 16a-17a. The CITY program continued to operate for approximately seven months until, in September 2009, the program was eliminated, and its remaining employees were terminated. *Id.* at 15a-16a.

2. a. Petitioner filed suit to challenge his termination. Petitioner sued Franks under 42 U.S.C. 1983, contending that Franks had violated the First Amendment by firing petitioner and failing to reinstate him as retaliation for petitioner's grand jury and trial testimony. Pet. App. 18a-19a, 23a. Petitioner sought damages from Franks in his individual capacity and sought equitable relief, including reinstatement, from Franks in his official capacity.[1] See *id.* at

[1] Petitioner raised additional claims in district court that he did not pursue on appeal. Petitioner claimed that his dismissal had

23a-26a. In response, Franks denied he had any retaliatory motive when he dismissed petitioner, and further claimed that dismissing petitioner for his testimony would not have violated the First Amendment. See *id.* at 17a, 29a. Franks also raised a defense of sovereign immunity. See *id.* at 25a.

The district court granted summary judgment to Franks. The court concluded that the record raised "some genuine issues of material fact * * * concerning Dr. Franks' true motivation for terminating [petitioner's] employment." Pet. App. 21a. It found, however, that Franks was entitled to qualified immunity as to the claims against him in his individual capacity, because it was not clearly established that dismissing petitioner for his testimony would have violated the First Amendment. *Id.* at 26a-34a. Petitioner had "learned of the information that he testified about while working as Director at C.I.T.Y." *Id.* at 29a. As a result, the court concluded, petitioner's "speech can still be considered as part of his official job duties and not made as a citizen on a matter of public concern, as the Eleventh Circuit has ruled in similar cases." *Id.* at 29a-31a (discussing *Abdur-Rahman* v. *Walker*, 567 F.3d 1278 (11th Cir. 2009); *Vila* v. *Padron*, 484 F.3d 1334 (11th Cir. 2007)).

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violated the Alabama State Employee Protection Act, Ala. Code § 36-26A-3 (1975)—a whistleblower protection measure that the district court found inapplicable. Pet. App. 4a, 18a. Petitioner also claimed a violation of 42 U.S.C. 1985, which prohibits conspiracies to deter or influence testimony in federal court. Petitioner voluntarily dismissed this claim. Pet. App. 4a, 19a. Petitioner also raised, but abandoned on appeal, claims against CACC and claims for money damages against Franks in his official capacity. *Id.* at 4a.

Further, the district court found, it was not clearly established that this First Amendment analysis changed because petitioner was testifying pursuant to subpoena. Pet. App. 31a-33a (discussing *Morris* v. *Crow*, 142 F.3d 1379 (11th Cir. 1998) (per curiam); *Martinez* v. *City of Opa-Locka*, 971 F.2d 708 (11th Cir. 1992) (per curiam)). The court determined that the claims against Franks also were barred by the Eleventh Amendment. *Id.* at 23a-26a.

b. The court of appeals affirmed in an unpublished per curiam opinion. Pet. App. 2a-8a. It held that petitioner's testimony was not protected by the First Amendment because petitioner's speech was that of an employee, not that of a citizen. *Id.* at 4a. The court relied on *Morris* v. *Crow*, *supra*, which had found a law enforcement officer's sworn deposition testimony unprotected when it largely reiterated statements that the officer had made in an accident report he prepared as part of his job duties. Pet. App. 6a-7a. In petitioner's case, as in *Morris*, "the subject matter of [petitioner's] testimony touched only on acts he performed as part of his official duties." *Id.* at 7a. In addition, "[a]s in *Morris*, nothing evidences that [petitioner] testified at Schmitz's trial 'primarily in [his] role as a citizen' or that his testimony was an attempt to comment publicly on CITY's internal operations." *Id.* at 8a (quoting *Morris*, 142 F.3d at 1382; third brackets in original). The court also concluded that *Morris* foreclosed the claim that a government employee's speech concerning official duties received protection because it had been given pursuant to subpoena. *Id.* at 7a & n.3.

The court of appeals added that "even if * * * a constitutional violation of [petitioner's] First Amend-

ment rights occurred in these circumstances, Franks would be entitled to qualified immunity in his personal capacity" because the First Amendment right at issue had not been clearly established. Pet. App. 4a n.2. The court did not reach Franks' Eleventh Amendment defense in light of its other rulings. *Id.* at 4a.

SUMMARY OF ARGUMENT

Public employees do not uniformly lack First Amendment protection for testimony, pursuant to subpoena, about information learned through their work for the government. Because the constitutional status of such speech was not clearly established at the time of petitioner's dismissal, however, respondent Franks is entitled to qualified immunity from an award of damages in his individual capacity.

1. A. The need to operate efficient and collegial workplaces justifies governments—like other employers—in taking action against employee speech that undermines their operations. At the same time, citizens do not give up their freedom of speech entirely by entering government service. The First Amendment protection afforded to government employees depends on a balancing of these interests. For almost fifty years, the Court has addressed these interests under the framework of *Pickering* v. *Board of Education*, 391 U.S. 563 (1968), by treating the speech of a public employee as protected when the employee speaks as a citizen on a matter of public concern, and the government employer lacks an adequate justification for treating the employee differently from other members of the public. See *Garcetti* v. *Ceballos*, 547 U.S. 410, 418 (2006).

Garcetti construed the requirement that a person must speak "as a citizen" to receive First Amendment

protection. It held that government employees do not speak as "citizens," entitled to constitutional protection, when they speak pursuant to their job responsibilities. This holding reflected a balancing of categorically strong government interests in controlling speech that the government itself commissioned against categorically weak private interests in such speech.

B. The court of appeals erred in extending *Garcetti* to hold that public employees uniformly lack First Amendment protection when they testify, under subpoena, about information learned through their public employment. *Garcetti* classified as unprotected speech "pursuant to" employment duties, which it equated with speech in which "the employee is simply performing his job duties." 547 U.S. at 421-423. The interest-balancing analysis that supported *Garcetti's* holding does not support a blanket rule foreclosing First Amendment protection for testimony that concerns information learned through public employment. To the contrary, that analysis supports the rule that an employee who testifies before a grand jury or at a federal criminal trial speaks "as a citizen," not as an employee, at least when such testimony is not part of the employee's job responsibilities. The public interests in open debate, accurate adjudication, and prosecution of public corruption would be best served by such a rule. And while government employers have legitimate interests in limiting employees' disclosures of job-related information under some circumstances, those interests have limited weight in many testimonial contexts. The fact that there was no evidence that petitioner intended to give public commentary—

rather than simply to fulfill the requirements of a subpoena—has no relevance to this analysis.

C. If this Court addresses, in the first instance, whether petitioner's employer was entitled to dismiss him for his testimony under the balancing framework of *Pickering*, it should find that such action would not have been justified here. Petitioner gave his testimony bearing on public corruption as a citizen, and that testimony addressed a matter of public concern. Respondents have suggested no managerial justification that would have supported dismissing petitioner for his speech. Accordingly, petitioner's claim for equitable relief should proceed.

2. Because it was not clearly established when petitioner was dismissed that the First Amendment protects public employees' testimony devoted to information obtained through their public employment, respondent Franks is entitled to qualified immunity from damages in his individual capacity.

A. The defense of qualified immunity bars damages awards against government officials for their discretionary acts, except in cases in which a government official "violated a statutory or constitutional right that was clearly established at the time of the challenged conduct." *Reichle* v. *Howards*, 132 S. Ct. 2088, 2093 (2012). Damages may not be awarded unless any reasonable official would have known that his actions violated the right at issue.

B. It was not clearly established when petitioner was dismissed that petitioner's testimony—dealing only with acts petitioner performed in his official duties—was the constitutionally protected speech of a citizen, not the unprotected speech of an employee. *Garcetti* declined to set out a framework that defined

unprotected employee speech. And neither *Garcetti* nor any of this Court's other decisions have dealt directly with public-employee testimony of this type. Further, as both of the lower courts in this case acknowledged, the precedents of the relevant court of appeals strongly suggested that testimony such as petitioner's lacked constitutional protection. Since no controlling authority or robust consensus of persuasive authority placed the constitutional question here beyond debate, Franks is entitled to immunity from damages.

ARGUMENT

I. A GOVERNMENT EMPLOYEE'S TESTIMONY DISCLOSING INFORMATION LEARNED THROUGH PUBLIC EMPLOYMENT IS NOT CATEGORICALLY EXCLUDED FROM FIRST AMENDMENT PROTECTION

The court of appeals held that the First Amendment did not protect petitioner's testimony because it consisted entirely of information petitioner learned through government employment and because petitioner did not intend his testimony to be commentary on a matter of public concern. That holding was erroneous. When government employees are subpoenaed to testify about facts learned through their employment, the public interest in speech free of governmental control is often strong, and the government's interest as employer in controlling that speech is not sufficiently strong to justify a categorical rule denying First Amendment protection to such speech. Because in this case, petitioner's testimony involved a matter of public concern and implicated no legitimate managerial interest, petitioner's testimony was protected by the First Amendment.

A. Speech By A Government Employee Is Protected If It Is Made As A Citizen On A Matter Of Public Concern And The Government's Interest As An Employer Does Not Outweigh The Interests Advanced By The Speech

1. For almost 50 years, whether the speech of a government employee is protected under the First Amendment has depended on "a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering* v. *Board of Educ.*, 391 U.S. 563, 568 (1968). In earlier years, the First Amendment was not understood to limit government personnel actions based on employee speech. See *Connick* v. *Myers*, 461 U.S. 138, 144 (1983); *McAuliffe* v. *City of New Bedford*, 29 N.E. 517, 517 (Mass. 1892) (Holmes, J.) ("The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.").

Pickering, however, concluded that such employment actions were best analyzed under a balancing approach, in light of the legitimate interests on both sides. On one hand, "the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." 391 U.S. at 568. "Government employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services." *Garcetti* v. *Ceballos*, 547 U.S 410, 418-419 (2006).

On the other hand, "public employees do not surrender all their First Amendment rights by reason of their employment." *Garcetti*, 547 U.S. at 417. "[A] citizen who works for the government is nonetheless a citizen," *id.* at 419, and "the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern, *id.* at 417 (citing cases); see also *Pickering*, 391 U.S. at 568.

Pickering established a two-step framework to balance these interests. First, a court must determine whether the employee spoke "as a citizen on a matter of public concern"; if not, then the First Amendment provides no protection. Second, if the employee spoke as a citizen on a matter of public concern, the court must assess whether the government had "an adequate justification for treating the employee differently from any other member of the public" based on the government's needs as an employer. *Garcetti*, 547 U.S. at 418; see also *Waters* v. *Churchill*, 511 U.S. 661, 667 (1994) (plurality); *Connick*, 461 U.S. at 142.

Conducting this analysis in *Pickering* itself, this Court extended First Amendment protection to a letter to the editor from a teacher criticizing the school board that employed him. The Court found that the teacher's speech had been as a citizen on a matter of public concern—the school budget—and that while the letter was "critical" of his employer, it did not "impede[] the teacher's proper performance of his daily duties in the classroom" or "interfere[] with the regular operation of the schools generally." 391 U.S. at 572-573.

2. *Garcetti* construed the requirement in *Pickering* that speech must be "as a citizen" to be protected

under the First Amendment. To do so, it looked to *Pickering*'s "overarching objectives" of safeguarding employees' ability to participate in public debate and ensuring the government had a free hand to manage its operations. *Garcetti*, 547 U.S. at 417-420. *Garcetti* concluded that employees' speech pursuant to their job responsibilities is unprotected because it is speech of an employee, rather than speech of a citizen. The Court reasoned that, as a categorical matter, such statements involve strong interests on the part of the government in controlling its own message and the employees' speech interests are correspondingly weak.

As to private interests, the Court reasoned, when the government controls speech that employees produce as part of their jobs, the government does not infringe "any liberties the employee might have enjoyed as a private citizen," because such control "simply reflects the exercise of employer control over what the employer itself has commissioned or created." *Garcetti*, 547 U.S. at 421-422 (citing *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995)).

On the other side of the balance, the government has "heightened interests in controlling speech made by an employee in his or her professional capacity," because "[o]fficial communications have official consequences, creating a need for substantive consistency and clarity." *Garcetti*, 547 U.S. at 422-423. As a result, "[s]upervisors must ensure that their employees' official communications are accurate, demonstrate sound judgment and promote the employer's mission." *Ibid.* In light of the interests uniformly present when employees speak as part of their job duties, the Court

concluded that "the First Amendment does not prohibit managerial discipline based on an employee's expressions made pursuant to official responsibilities." *Id.* at 424.

The Court applied this rule to reject a First Amendment claim based on speech that was conceded to be pursuant to an employee's job duties. *Garcetti*, 547 U.S. at 421. The plaintiff, a prosecutor, had alleged that he was fired based in part on a memorandum that he wrote as part of his job as the "calendar deputy." Because it concluded that the First Amendment "does not prohibit managerial discipline based on an employee's expressions made pursuant to official responsibilities," the Court found the speech unprotected. *Id.* at 424. Since the parties agreed that the plaintiff "wrote his disposition memo pursuant to his employment duties," the Court "ha[d] no occasion to articulate a comprehensive framework for defining the scope of an employee's duties in cases where there is room for serious debate." *Ibid.*

B. Speech That Discloses Information Learned From Public Employment May Be Speech "As A Citizen" Under The First Amendment

Garcetti held that when a public employee speaks pursuant to job responsibilities, the employee speaks as an employee and not as a citizen, and First Amendment protection is thus categorically unavailable. Contrary to the Eleventh Circuit's decision here, however, *Garcetti* did not foreclose First Amendment protection whenever the employee's speech "touche[s] only on acts [the speaker] performed as part of his official duties." Pet. App. 7a. Nor does *Garcetti*'s reasoning support a blanket denial of First Amendment protection to such speech. At least when provid-

ing testimony is not a regular part of a public employee's job responsibilities, testimony before a federal grand jury or at a federal criminal trial is generally speech of a citizen, not speech of an employee, and that is so even if the testimony covers only information learned through public employment. Where the testimony addresses a matter of public concern, under *Pickering*, such testimony is protected in the absence of a countervailing legitimate interest on the part of the government employer.

1. *Garcetti* held that statements qualify as the unprotected speech of an "employee" when they are made "pursuant to" the employee's official duties. 547 U.S. at 413. In distinguishing between the categorically unprotected speech of individuals speaking as employees and the potentially protected speech of those speaking as citizens, *Garcetti* referred to speech "pursuant to" employment duties a dozen times. This phrase is most naturally read to reach only speech "in the course of carrying out" employment duties. See *Webster's Third New International Dictionary* 1848 (1993). And *Garcetti* made this meaning plain when it equated speech that is pursuant to employment duties with speech "fulfilling a [work] responsibility," speech as "part of what [the employee] * * * was employed to do," 547 U.S. at 421, speech that was part of the employee's "perform[ing] the tasks he was paid to perform," *id.* at 422, and speech in which "the employee is simply performing his job duties," *id.* at 423.

The Court should not be understood to have expanded the scope of its holding by referring—in a sentence on which the court of appeals has relied for a broader rule—to "speech that owes its existence to a public employee's professional responsibilities." See

Abdur-Rahman v. *Walker*, 567 F.3d 1278, 1283 (11th Cir. 2009) (quoting *Garcetti*, 547 U.S. at 421). The very next sentence of *Garcetti* indicates that this statement referred to speech "the employer itself has commissioned or created"—in other words, speech the employer called for the employee to make. 547 U.S. at 422. And the Court reinforced this meaning with a citation to a case involving the government's right to control those who speak on its behalf. *Ibid.* (citing *Rosenberger*, 515 U.S. at 833).

The scope of the Court's holding in *Garcetti* is especially clear in its guidance regarding how to determine whether speech is pursuant to employment duties. To ascertain whether speech was outside the scope of the First Amendment as employee speech, the Court called for a "practical" inquiry into "the duties an employee actually is expected to perform." 547 U.S. at 424-425. By directing courts to focus on employees' job duties, rather than the basis of employees' knowledge, the Court made clear that *Garcetti*'s holding did not extend as far as the Eleventh Circuit believed.

2. The Eleventh Circuit was wrong to expand *Garcetti* to deny First Amendment protection to all speech that conveys information learned through public employment. *Garcetti* excluded from protection speech pursuant to an employee's job duties after finding that such speech uniformly couples weak individual interests in free expression with strong interests in managerial control. No comparable categorical balancing justifies rendering unprotected all speech that concerns information learned through public employment.

a. There are often strong private and public interests in the uniquely well-informed speech of public employees conveying information learned from their job responsibilities. First, government employees themselves have an interest in engaging in such speech. Were government employees unable to draw from—and describe—their professional experiences while participating in public debate, their ability to participate meaningfully would be limited. Cf. *Garcetti*, 547 U.S. at 421-422.

More critically, treating speech as categorically unprotected when it contains information learned through public employment would strip protection from speech that this Court has recognized to be of particularly great public value. See *Pickering*, 391 U.S. at 572; *Garcetti*, 547 U.S. at 419, 421. *Garcetti* and *Pickering* recognized that public employees' speech on topics related to their employment is of special value precisely *because* public employees gain knowledge through their work that may inform civic debate. Thus, *Pickering* rejected the proposition that teachers could be restrained from speaking about revenue-raising proposals of the school board in part because teachers are "the members of a community most likely to have informed and definite opinions" about school funding. 391 U.S.at 572. *Garcetti* noted that "[t]he same is true of many other categories of public employees." 547 U.S. at 421. *Garcetti* declined to interpret the category of unprotected employee speech in a manner that would encompass any "expressions related to the speaker's job" precisely because doing so would disserve the public interest in hearing speech from a particularly informed group of speakers. *Ibid.* It would similarly disserve public

debate to strip such speakers of First Amendment protection in every case where they share facts learned from public employment that underlie their opinions.

To be sure, government employers often have legitimate interests in limiting the dissemination of information to which employees have access due to public employment, by virtue of the government's "wide discretion and control over the management of [their] personnel and internal affairs." *Connick*, 461 U.S. at 150 (citation omitted). For instance, government employers have interests in prohibiting the disclosure of sensitive or confidential information, which may range from tax records and trade secrets to information about law enforcement sources or sensitive investigative techniques. See 28 C.F.R. 16.26(b) (identifying sensitive information whose disclosure is not authorized even in judicial proceedings without high-level approvals); see also *Pickering*, 391 U.S. at 570 n.3 (noting that "need for confidentiality" is an interest that may justify dismissal of employees for truthful statements). The need for "substantive consistency and clarity" in communications about an entity's activities, see *Garcetti*, 547 U.S. at 422, can also support the designation of particular employees as the exclusive spokespersons who respond to queries about particular activities. But these significant government interests can be addressed under the second step of *Pickering*'s tailored approach, by considering whether there are particular interests present that overcome the employee's speech interests. They are not sufficiently pervasive to justify the categorical exclusion from First Amendment protection that the Eleventh Circuit imposed. Cf. *id.* at 422

(adopting rule concerning statements pursuant to employment duties in reliance on categorical determination that "[e]mployers have heightened interests in controlling speech made by an employee in his or her professional capacity").

b. In the particular context of employee testimony before a grand jury or at a federal criminal trial, the *Garcetti* balance should be struck precisely contrary to the way the Eleventh Circuit believed: at least when the testimony is not part of the employee's job responsibilities, such testimony from an employee is speech by a citizen, not an employee, for purposes of *Pickering*.

Striking the balance in that fashion best serves the truth-seeking processes of grand juries and trials. See *Garcetti*, 547 U.S. at 422 (noting "our precedents' attention to the potential societal value of employee speech"). This Court has long recognized that "[t]he very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence," *United States* v. *Nixon*, 418 U.S. 683, 709 (1974), which in turn requires that—absent a valid claim of privilege—the public must have access to "every man's evidence." *Branzburg* v. *Hayes*, 408 U.S. 665, 688 (1972) (citation omitted) (declining to create reporter's privilege). It has also acknowledged that if a witness fears adverse consequences from her statements, the witness may have an incentive to "shade his testimony." *Briscoe* v. *LaHue*, 460 U.S. 325, 333 (1983). As the Court explained in justifying the absolute immunity of witnesses, a witness fearing civil liability "might be reluctant to come forward to testify" and, once on the witness stand, their "testimony

might be distorted," because "[e]ven within the constraints of the witness' oath there may be various ways to give an account or to state an opinion." *Ibid.* Because the prospect of losing a job, no less than the prospect of civil liability, may provide an incentive for witnesses to shade their testimony, the truth-seeking function of trials would be best served by a rule that treats employee testimony as citizen speech, subject to *Pickering* balancing, even when the statements focus on matters learned through public employment.

That rule is particularly appropriate given the public interest in the detection and prosecution of official corruption. The more than 1000 prosecutions for federal corruption offenses that are brought in a typical year, see DOJ, *Report to Congress on the Activities and Operations of the Public Integrity Section For 2012*, http://www.justice.gov/criminal/pin/docs/2012-Annual-Report.pdf, at 24-30; DOJ, *Fact Sheet: the Department of Justice Public Corruption Efforts*, http://www.justice.gov/opa/pr/2008/March/08_ag_246.html, often depend on evidence about activities that government officials undertook while in office. This may require testimony from other government employees. The case at hand illustrates that point: to establish that a state legislator held a no-show job, prosecutors relied heavily on testimony from those who worked at the government program where the legislator was nominally employed, including a computer technician, a regional coordinator for the CITY program, and a business manager, in addition to petitioner. See *United States* v. *Schmitz*, 634 F.3d 1247, 1253-1255 (11th Cir. 2011). A rule treating public employees' testimony as citizen speech even if it concerns matters

learned through public employment helps to protect this vital speech.

Finally, public employees who testify pursuant to subpoena have an additional personal interest in being protected against employment actions. Such employees face civil or criminal sanctions for failing to testify or for testifying falsely. Their interest in speaking about information learned through public employment is therefore not simply their interest in expression but also their interest in avoiding criminal and civil consequences for noncompliance that they would bear directly. See, *e.g.*, 18 U.S.C. 401(3) (criminalizing failure to comply with court "order, rule, decree, or command"); 28 U.S.C. 1826(a) (authorizing court to "summarily order [the] confinement" of a witness "in any proceeding before or ancillary to any court or grand jury of the United States [who] refuses without just cause shown to comply with an order of the court to testify or provide other information"); 18 U.S.C. 1623 (criminalizing perjury).

By contrast, the government's interest in sanctioning employees for testimony that is not given as part of official duties is not so strong that it invariably trumps the speech interests at stake. To be sure, the government may have a strong interest in supervising employees' testimony in some cases in which giving testimony is not itself part of the official duties of the employee. For instance, agencies may, by regulation, create centralized review and approval processes for subpoenas that seek information learned by government employees through their official duties. See *United States ex rel. Tuohy* v. *Ragen*, 340 U.S. 462 (1951). In addition, where the government has a claim of privilege over information to which its employees

have access, the government has a compelling interest in requiring its employees to safeguard its interests by invoking that privilege. See, *e.g.*, *General Dynamics Corp.* v. *United States*, 131 S. Ct. 1900, 1905 (2011) (noting that "compelling necessity of governmental secrecy" requires "a Government privilege against court-ordered disclosure of state and military secrets"); *Gabelli* v. *SEC*, 133 S. Ct. 1216, 1223 (2013) (stating that the "[g]overnment can be expected to assert various privileges, such as law enforcement, attorney-client, work product, or deliberative process").

When, however, employees are subpoenaed in their personal capacity to testify about facts that are not protected from disclosure, in a manner that complies with applicable regulations, government employers have no legitimate interest in preventing the employee from appearing or from telling the truth. Indeed, in the particular case here, respondents have never asserted that petitioner's testimony disserved any legitimate government interest.

3. A public employee's motive is irrelevant to this analysis. In concluding that petitioner's testimony was the categorically unprotected speech of an "employee," rather than the speech of a citizen, the court of appeals relied in part on the fact that petitioner had not offered evidence "that his testimony was an attempt to comment publicly on CITY's internal operations." Pet. App. 8a; see also *id.* at 6a.

This line of inquiry, however, is not compatible with this Court's approach to employee speech. When this Court has found statements to be protected speech as a citizen on a matter of public concern, it has done so without regard to whether the speaker's

motive was to contribute to debate. See, *e.g.*, *Pickering*, 391 U.S. at 568-575 (concluding that plaintiff who spoke as citizen on matter of public concern could be dismissed only on showing that statements were knowingly or recklessly false or based on balancing of government and private interests); *Rankin* v. *McPherson*, 483 U.S. 378 (1987) (finding statements to be constitutionally protected speech as citizen on matter of public concern without analysis of speaker's motive). Conversely, the Court has found motive immaterial when it has found employee speech unprotected. See *Garcetti*, 547 U.S. at 421 (finding it "immaterial whether [an employee] experienced * * * personal gratification from writing" memorandum at issue).

This is not coincidental, because the balancing of interests that has controlled the employee-speech jurisprudence, see, *e.g.*, *Garcetti*, 547 U.S. at 417-423, is largely unaffected by employees' motivations. On the one hand, the public interest in obtaining truthful testimony is equally served when an employee is motivated by the objective of "compl[ying] with a subpoena to testify truthfully" as when the employee motivated by a desire to give "public comment." See Pet. App. 6a. Similarly, the public has an interest in "receiving the well-informed views of government employees" regardless of the employees' motives. *Garcetti*, 547 U.S. at 419. Even statements not supported by laudable motivations "contribute to the free interchange of ideas and the ascertainment of truth." *Hustler Magazine, Inc.* v. *Falwell*, 485 U.S. 46, 53 (1988) (citation omitted). On the other side of the balance, an employer's interests in operating efficiently, avoiding workplace discord, and controlling the articulation of the

government's own message exist independent of the motivation of employees to engage in employment-related speech. Accordingly, in an approach that seeks to balance the interests at stake, an employee's motive is not part of the test.

C. The Court Of Appeals Erred In Finding Petitioner's Speech Unprotected

Because testimony is not categorically excluded from First Amendment protection when it concerns information learned from public employment, and because testimony such as that at issue here is speech "as a citizen" regardless of the employee's motive for testifying, the court of appeals erred in concluding that petitioner's testimony was categorically unprotected employee speech. Petitioner's speech was not pursuant to employment duties because there was no evidence below that testifying in connection with criminal cases was "part of what [petitioner] * * * was employed to do," *Garcetti*, 547 U.S. at 421, or among the "tasks he was paid to perform," *id.* at 422. Rather, the record reflected that as director of the CITY program, petitioner's responsibilities involved hiring and firing employees, making financial decisions, and overseeing the day-to-day operations of a program serving youth. Pet. App. 10a. Accordingly, contrary to the decision below, petitioner's speech was protected by the First Amendment if it addressed a matter of public concern and if the interests served by the speech were not outweighed by countervailing government interests under *Pickering*. In light of its categorical exclusion of petitioner's testimony from First Amendment protection, the Eleventh Circuit did not apply the remainder of the *Pickering* analysis to the speech at issue here. Accordingly, this Court

could reasonably remand the case to the court of appeals to conduct the *Pickering* analysis.

To the extent that this Court elects to conduct the *Pickering* analysis in the first instance, it should conclude that there was no basis to dismiss petitioner for his testimony. Petitioner's testimony involved a classic matter of public concern. Speech addresses a matter of public concern when it relates "to any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest: that is, a subject of general interest and of value and concern to the public." *Snyder* v. *Phelps*, 131 S. Ct. 1207, 1216 (2011) (citation and internal quotation marks omitted); see also *City of San Diego* v. *Roe*, 543 U.S. 77, 84 (2004) (per curiam). This Court has looked to "the content, form, and context of a given statement" to determine whether a statement is addressed to such a matter. *Connick*, 461 U.S. at 147-148.

Petitioner's statements satisfy this standard. This Court has explained that "there is a demonstrated interest in this country that government service should depend upon meritorious performance rather than political service," *Connick*, 461 U.S. at 149, and that "[e]xposing governmental inefficiency and misconduct is a matter of considerable significance," *Garcetti*, 547 U.S. at 425. Petitioner's testimony addressed these matters: It exposed misconduct on the part of a state legislator and inefficiency in the management of a government program. The form and context of petitioner's statements reinforce this conclusion. An employee's giving testimony pursuant to subpoena in judicial proceedings does not suggest that the employee's statements were, in context, "most accurately characterized as an employee grievance."

Connick, 461 U.S. at 154. On the contrary, because the integrity of judicial proceedings depends on the truthful testimony of witnesses, see *Nixon*, 418 U.S. at 709, the context heightened the public interest at stake. See, *e.g.*, *Karl* v. *City of Mountlake Terrace*, 678 F.3d 1062, 1069 (9th Cir. 2012) (suggesting that "an employee's testimony may be a matter of public concern if it contributes in some way to the resolution of a judicial or administrative proceeding in which discrimination or other significant government misconduct is at issue") (internal quotation marks omitted).

Finally, petitioner's employer had no "adequate justification for treating the employee differently from any other member of the general public" based on his speech. *Garcetti*, 547 U.S. at 418. Respondents neither demonstrated nor alleged any managerial interest that was undermined by petitioner's testimony. Because petitioner did not "personally confront[] his immediate supervisor" or "exercise[his] rights to speech at the office" his manner of speech was not likely to engender workplace disruption. *Connick*, 547 U.S. at 153. Nor have respondents suggested any lawful interest in barring the disclosure of the information about which petitioner testified. As a result, respondents would not have been justified under *Pickering* in dismissing petitioner based on his testimony, and petitioner's claims for equitable relief should be permitted to proceed. Since the Eleventh Circuit did not resolve whether petitioner's claims for equitable relief such as reinstatement are barred under the Eleventh Amendment, that issue may be addressed by the court of appeals in the first instance.

II. RESPONDENT FRANKS IS ENTITLED TO QUALIFIED IMMUNITY FROM DAMAGES IN HIS INDIVIDUAL CAPACITY

Although petitioner alleged facts that would, if true, establish retaliation in violation of the First Amendment, the dismissal of claims against Franks in his individual capacity should be affirmed, because Franks is entitled to qualified immunity.

A. Under the defense of qualified immunity to claims under 42 U.S.C. 1983, damages may not be awarded against a government official in his personal capacity "unless the official violated a statutory or constitutional right that was clearly established at the time of the challenged conduct." *Reichle* v. *Howards*, 132 S. Ct. 2088, 2093 (2012). By barring damage awards against "all but the plainly incompetent and those who knowingly violate the law." *Hunter* v. *Bryant*, 502 U.S. 224, 229 (1991) (citation omitted), qualified immunity "protects the balance between vindication of constitutional rights and government officials' effective performance of their duties by ensuring that officers can 'reasonably anticipate * * * when their conduct may give rise to liability for damages." *Reichle*, 132 S. Ct. at 2093 (citation omitted). In addition, by "giv[ing] government officials breathing room to make reasonable but mistaken judgments about open legal questions," *Ashcroft* v. *al-Kidd*, 131 S. Ct. 2074, 2085 (2011), the doctrine curbs the "inhibition of discretionary action" and "deterrence of able people from public service" to which an individual damages remedy might otherwise lead, in addition to avoiding the "distraction of officials from their governmental duties" that can be a cost of trial, *Mitchell* v. *Forsyth*, 472 U.S. 511, 525-526 (1985).

To defeat the qualified immunity defense, a plaintiff must establish that (i) the defendant committed "a violation of a constitutional right" and (ii) "the right at issue was 'clearly established' at the time of [the] defendant's alleged misconduct." *Pearson* v. *Callahan*, 555 U.S. 223, 232 (2009). "If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982).

The inquiry into whether a right was "clearly established" requires that a court first define the right at the appropriate level of specificity. Framed "as a broad general proposition"—for instance, that "the First Amendment prohibits government officials from subjecting an individual to retaliatory actions" for their speech as citizens—any constitutional prohibition would be clearly established, and no official would be entitled to qualified immunity. *Reichle*, 132 S. Ct. at 2094 (citations omitted); *Wilson* v. *Layne*, 526 U.S. 603, 615 (1999). Instead, a right must be established "in a 'particularized' sense so that the 'contours' of the right are clear to a reasonable official." *Reichle*, 132 S. Ct. at 2094 (citation omitted).

Once the right is framed at the appropriate level of specificity, a court must ask whether "every reasonable official would [have understood] that what he is doing violates that right." *Reichle*, 132 S. Ct. at 2093 (citation and internal quotation marks omitted; brackets in original). While this standard does not "require a case directly on point," it requires either "controlling authority" or "a robust 'consensus of cases of

persuasive authority'" of sufficient clarity to have placed "the statutory or constitutional question beyond debate." *Al-Kidd*, 131 S. Ct. at 2084 (quoting *Wilson*, 526 U.S. at 617).

B. At the time petitioner was dismissed, it was not clearly established that dismissing petitioner for his testimony would violate petitioner's First Amendment rights. Because the First Amendment provides no cause of action based on a public employer's response to an employee's speech unless the employee has "spoke[n] as a citizen on a matter of public concern," *Garcetti*, 547 U.S. at 418, a constitutional violation could be clearly established only if it would have been clear to any reasonable official that petitioner spoke as a citizen, not as an employee, when he gave subpoenaed testimony that "touched only on acts he performed as part of his official duties." Pet. App. 7a.

Certainly *Garcetti* did not establish that proposition. *Garcetti* made clear that speech pursuant to an employee's official duties is unprotected, but did not address whether speech devoted exclusively to disclosing information learned through public employment falls within that unprotected category. Speech of that type was not before the Court in *Garcetti*. And because the issue was not presented in the case before it, the Court declined to delineate the boundary between protected citizen speech and unprotected employee speech, stating that it did not have occasion to "articulate a comprehensive framework for defining the scope of an employee's duties in cases where there is room for serious debate." 547 U.S. at 424.

Nor has any other decision of this Court, prior to or after *Garcetti*, conferred protection on speech consisting entirely of information an employee learned

through public employment. While *Pickering* and subsequent cases treated speech as protected when employees expressed views that were informed by their government positions, none of those cases addressed speech that simply relayed information about acts performed as part of a speaker's official duties. See Pet. App. 7a-8a. Accordingly, none of those cases considered whether speech of that type is so closely tied to employees' job responsibilities as to constitute speech as an employee rather than a citizen.

Also insufficient for qualified immunity purposes are this Court's cases supporting the notion that "all citizens owe an independent duty to testify in court proceedings." Pet. Br. 41 (citing *Reilly* v. *City of Atlantic City*, 532 F.3d 216 (3d Cir. 2008), cert. denied, 555 U.S. 1170 (2009), and collecting cases). While those cases may establish the obligation of every citizen to testify when called, they do not clearly establish that every person who testifies invariably does so as a citizen, and not as an employee.

C. The cases of the courts of appeals likewise did not provide clear notice that it was unconstitutional to fire an employee based on testimony that related solely to the employee's job responsibilities. This Court has looked to the precedent of the circuit in which a case arose as part of its determination of clearly established law. See, *e.g.*, *Pearson*, 555 U.S. at 244; *Safford United Sch. Dist. No. 1* v. *Redding*, 557 U.S. 364, 378 (2009). Here, as the courts below recognized in petitioner's case, Eleventh Circuit law at the time of petitioner's dismissal did not clearly establish that his testimony was constitutionally protected, but instead pointed strongly to the conclusion that testimony of this type was unprotected. In *Morris* v.

Crow, 142 F.3d 1379 (1998) (per curiam), the case on which the court of appeals relied most heavily below, a plaintiff claimed to have been fired from his job in a sheriff's office based in part on a civil deposition in which the plaintiff recounted his investigation of a car crash involving another officer. The plaintiff had investigated the crash and prepared an accident report as part of his job, but there was no "evidence that [the plaintiff] gave deposition testimony for any reason other than in compliance with a subpoena to testify truthfully in [a] civil suit." *Id.* at 1382.

Morris held that the speech was unprotected. In analyzing the plaintiff's claim, *Morris* anticipated *Garcetti* by holding that employee speech is protected only when it "was made primarily in the employee's role as citizen, rather than primarily in the role of employee," 142 F.3d at 1382, though it recognized that the Supreme Court had not then decided "whether speech that occurs in the course of and as part of an employee's ordinary duties is protected," *id.* at 1381. *Morris* then found the plaintiff's testimony to be unprotected speech of an employee, emphasizing that the testimony principally "reiterated" the plaintiff's "conclusions regarding his observations of [an] accident" that he had made and then described in an accident report as part of his job duties. *Id.* at 1382. *Morris* also noted that there was no evidence that the plaintiff's speech had been motivated by a desire to participate in public debate, emphasizing that the speech could not "be characterized as an attempt to make public comment on sheriff's office policies and procedures, the internal workings of the department, the quality of its employees, or upon any issue at all." *Ibid.* It distinguished on this ground a prior case that

had found testimony to be protected. *Id.* at 1382-1383 (discussing *Martinez* v. *City of Opa-Locka*, 971 F.2d 708, 712 (11th Cir. 1992) (per curiam)).

As the court of appeals noted shortly after petitioner's firing, other cases in the Eleventh Circuit had also found no First Amendment violation in the dismissal of employees for speech closely related to their employment, notwithstanding claims that the employees had not been required to engage in the speech as part of their work. See *Abdur-Rahman*, 567 F.3d at 1284 (noting that "[i]f we had examined only whether the employees' official responsibilities required them to speak" the court "would have reached a different result" in *D'Angelo* v. *School Bd. of Polk Cnty.*, 497 F.3d 1203 (11th Cir. 2007), *Vila* v. *Padron*, 484 F.3d 1334 (11th Cir. 2007), and *Battle* v. *Board of Regents*, 468 F.3d 755 (11th Cir. 2006)).

And in reliance on *Garcetti* and Eleventh Circuit cases, *Abdur-Rahman* squarely held that speech about "information acquired and observations made during the course of performing [an employee's] official duties"—like petitioner's speech—was unprotected. 567 F.3d at 1286. Applying *Garcetti*, the court defined the employee-speech category to reach statements that conveyed information learned through government work: the speech "owed its existence to [the] employee's professional duties," *id.* at 1283 (citing *Garcetti*, 547 U.S. at 424), and the court saw "no relevant analogue to speech by citizens" insofar as the speech reported information learned through government work, *id.* at 1285-1286 (quoting *Garcetti*, 547 U.S. at 424). Although *Abdur-Rahman* was decided several months after petitioner's dismissal, it confirms that reasonable jurists could disagree regarding

whether, after *Garcetti*, speech devoted solely to conveying information learned in public employment qualified as unprotected employee speech. In short, a government employee in the Eleventh Circuit would not have taken from the case law a rule that an employee speaks as a citizen unless their speech is part of their job responsibilities. Nor would such an employee have surmised that such speech is protected merely because it comes in the form of testimony.

The cases cited by petitioner do not establish—let alone clearly establish—a rule to the contrary. Petitioner relies on two earlier cases in which the Eleventh Circuit had concluded that particular testimony of public employees had been constitutionally protected. See Pet. Br. 35-37 (discussing *Tindal* v. *Montgomery Cnty. Comm'n*, 32 F.3d 1535 (11th Cir. 1994) (deposition in lawsuit alleging race and sex discrimination); *Martinez*, 971 F.2d at 712 (testimony before legislative body investigating noncompliance with purchasing rules)). But as noted above, *Morris* subsequently indicated that an employee's testimony concerning work activities is unprotected absent "evidence that [a plaintiff] gave * * * testimony for any reason other than in compliance with a subpoena to testify truthfully." 142 F.3d at 1382. The court even explicitly indicated that *Martinez* could be distinguished on those grounds. *Id.* at 1382-1383. In light of *Morris*, these earlier cases cannot be read to clearly establish that employee testimony concerning work activities is protected absent evidence that the testimony was motivated by an objective other than subpoena compliance. Indeed, petitioner concedes that in light of *Morris*, the cases that he cites cannot be read to establish First Amendment protection for all em-

ployee testimony. See Pet. Br. 39. And were there ambiguity as to the line between protected and unprotected testimony, the district court was surely correct that "*Martinez* and *Crow* do not create clear and binding precedent so well-established" that Franks should have known that petitioner's speech fell on the protected side of the line. Pet. App. 33a.

Finally, petitioner suggests that no reasonable person in Franks' position could have believed petitioner's testimony was that of an employee in light of decisions of the Third and Seventh Circuits finding testimony to be constitutionally protected when it disclosed information learned through a public employee's job. Pet. Br. 41-45 (discussing *Reilly, supra*; *Morales* v. *Jones*, 494 F.3d 590 (7th Cir. 2007); *Fairley* v. *Fermaint*, 482 F.3d 897 (7th Cir. 2007)). As discussed above, however, Franks' own jurisdiction had taken a different approach. See *Morris*, 142 F.3d at 1382; Pet. App. 7a n.3 (acknowledging *Reilly* and *Morales* but noting that "*Morris* is the law in this Circuit on the question of public employee speech per a subpoena in the context of judicial proceedings"). Petitioner cites no authority to suggest that an official acts unreasonably in adhering to controlling authority in the official's own jurisdiction. And in any event, especially in light of the Eleventh Circuit's contrary jurisprudence, the views of the two circuits on which petitioner relies cannot be said to represent "a robust 'consensus of cases of persuasive authority'" concerning employee speech after *Garcetti* that is sufficient to place the constitutional question in this case "beyond debate." *Al-Kidd*, 131 S. Ct. at 2084 (citation omitted). When "judges * * * disagree on [the] constitutional question" presented, it would be "unfair to

subject [government officials] to money damages for picking the losing side of the controversy." *Wilson*, 526 U.S. at 618; see also, *e.g.*, *Reichle*, 132 S. Ct. at 2097.

CONCLUSION

The judgment of the court of appeals should be affirmed as to the claims against Franks in his individual capacity and reversed as to the claims against Burrow in her official capacity.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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Supreme Court of the United States

EDWARD LANE,

Petitioner,

v.

STEVE FRANKS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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INTEREST OF AMICUS[1]

Alliance Defending Freedom is a non-profit, public interest legal organization that provides strategic planning, training, funding, and direct litigation services to protect our first constitutional liberty—religious freedom. Since its founding in 1994, Alliance Defending Freedom has played a role, either directly or indirectly, in many cases before this Court, including: *Arizona Christian School Tuition Organization v. Winn*, 131 S. Ct. 1436 (2011); *Christian Legal Society v. Martinez*, 130 S. Ct. 2971 (2010); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Good News Club v. Milford Central School*, 533 U.S. 98 (2001); and *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995); as well as hundreds more in lower courts.

Additionally, Alliance Defending Freedom is counsel in two cases pending before the Court this term: *Galloway v. Town of Greece*, 681 F.3d 20 (2d Cir. 2012), *cert. granted*, 133 S. Ct. 2388 (U.S. May 20, 2013); and *Conestoga Wood Specialties Corp. v. Sebelius*, 724 F.3d 377 (3d Cir. 2013), *cert. granted*, 134 S. Ct. 678 (U.S. Nov. 26, 2013).

Many of these cases involve the proper application of the Free Speech Clause in educational

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[1] The parties granted mutual consent to the filing of all *amicus curiae* briefs and that consent is on file with the Clerk of Court. As required by Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, and no person other than the *amicus* and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

or employment contexts. Public employees who wish to share their faith inside and outside the office are often victims of unlawful retaliation due to their protected expression. Recognizing that the Court's decision in this case could have an impact on the ability of faculty at public universities to protect their First Amendment rights, Alliance Defending Freedom submits this *amicus curiae* brief to raise awareness of these issues.

SUMMARY OF THE ARGUMENT

Since the Court decided *Garcetti v. Ceballos*, 547 U.S. 410 (2006), the lowers courts have been in disarray over how much constitutional protection public employees should receive, with the central disagreement revolving around what constitutes a public employee's job duties. This case is a perfect example of that confusion. Respondent Steve Franks and Central Alabama Community College did not employ Petitioner Edward Lane to testify on their behalf in court proceedings. Rather, they employed him to run a program for at-risk youth. But when Lane learned of government corruption on the job and testified about that corruption outside the workplace after receiving a federal subpoena, Franks fired him. The Eleventh Circuit sanctioned Frank's decision because Lane testified in court about information he discovered while on the job. It did so by reading expansively his job duties and concluding that he spoke as an employee who deserved no First Amendment protection.

This case presents a good opportunity for the Court to explain the limitations of and provide

clarity to its ruling in *Garcetti*. A person who works for the government and is subpoenaed to testify in a civil or criminal proceeding, like Mr. Lane, should receive full First Amendment protection from possible adverse employment actions resulting from that testimony. The Eleventh Circuit's holding that a public employee deserves no such protection reveals a fundamental problem with *Garcetti*. At the core of that problem is an overly broad job duties test that serves as a carte blanch for employers to discipline employees when they utter disagreeable messages outside the workplace. The job duties test, as demonstrated by this case and similar cases, lends itself to multiple interpretations and inconsistency in the law. In particular, it enables loyalty oaths and endangers academic freedom.

When deciding the merits of Mr. Lane's claims—which warrant reversal of the Eleventh Circuit's decision—the Court should take the opportunity to clarify the public employee speech doctrine announced in *Garcetti*, especially the job duties test. A public employee should receive full First Amendment protection when speaking on matters of public concern, unless the employer can demonstrate that such speech disrupts implementation of the employer's business operations.

ARGUMENT

I. *GARCETTI*'S BROAD JOB DUTIES TEST HAS LED TO WIDE DISAGREEMENT IN THE CIRCUITS.

In *Garcetti*, the Court held that "when public employees make statements pursuant to their

official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." 547 U.S. at 421. Richard Ceballos was a calendar deputy in the Los Angeles County District Attorney's Office. *Id.* at 413. He wrote an internal memorandum expressing his concerns about inaccuracies in an affidavit used to obtain a search warrant. Afterward, he suffered a series of retaliatory employment actions. *Id.* at 414-15. The Court ruled that he deserved no First Amendment protection because his speech was related to his job duties.

The Court acknowledged that "public employees do not surrender all their First Amendment rights by reason of their employment," *id.* at 417, but when "a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom," *id.* at 418. In balancing societal interests served by employees speaking as citizens on matters of public concern with the needs of government employers attempting to perform important public functions, the Court ruled that the "controlling factor" in deciding whether a public employee's speech receives First Amendment protection is whether "his expressions were made pursuant to his [job] duties." *Id.* at 421.

Garcetti describes a job duty as anything that "owes its existence to a public employee's professional responsibilities" and something that "the employer itself has commissioned or created." *Id.* at 421-22. When Ceballos "went to work and performed the tasks he was paid to perform, [he]

acted as a government employee" and his speech was not protected. *Id.* at 422. The reason for this is that "[o]fficial communications have official consequences, creating a need for substantive consistency and clarity" that promotes the "employer's mission." *Id.* at 422-23. But the Court declined to "articulate a comprehensive framework for defining the scope of an employee's duties," stating instead that the inquiry is a "practical one." *Id.* at 424. This has left lower courts in disarray[2] because the job duties test "lends itself to multiple interpretations." *Weintraub v. Bd. of Educ. of City Sch. Dist. of City of N.Y.*, 593 F.3d 196, 205 (2d Cir. 2010) (Calabresi, J., dissenting).

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[2] *See, e.g.*, Caroline A. Flynn, Note, *Policeman, Citizen, or Both? A Civilian Analogue Exception to* Garcetti v. Ceballos, 111 MICH. L. REV. 759, 771 (2013) ("But this language does not create a satisfactory standard for lower courts to apply to the facts of other cases, as the past six years of post-*Garcetti* decisions have illustrated. Some courts, for instance, apply a standard that asks whether the employee's speech is required by her job; others ask whether the speech aids or furthers the employee's execution of her responsibilities in some way.") (citing cases); Thomas Keenan, Note, *Circuit Court Interpretations of* Garcetti v. Ceballos *and the Development of Public Employee Speech*, 87 NOTRE DAME L. REV. 841, 842 (2011) ("Though the circuits do share a number of tests, *Garcetti*'s nebulous language has allowed great leeway for courts to adopt their own unique approaches. As a result, the process of resolving a public employee's scope of employment for First Amendment purposes often varies with the jurisprudence of the individual circuits. More importantly, even where a court can plainly ascertain the scope of employment, *Garcetti*'s categorical holding provides no leeway for speech of such public importance that it may deserve constitutional protection despite the fact that it exists because of the employee's official duties.").

The lack of a comprehensive framework for determining a public employee's job duties has resulted in conflict among the circuits. Some circuits do not heed the "practical" inquiry into job duties called for by *Garcetti*, 547 U.S. at 424. For example, the Fifth, Tenth, and D.C. Circuits hold that the question of whether a public employee has spoken as a citizen or as an employee, which requires evaluation of his job duties, is a question of law for the courts to decide, not a question of fact for a jury. *See Charles v. Grief*, 522 F.3d 508, 513 n.17 (5th Cir. 2008); *Brammer-Hoelter v. Twin Peaks Charter Academy*, 492 F.3d 1192, 1202-03 (10th Cir. 2007); *Wilburn v. Robinson*, 480 F.3d 1140, 1149 (D.C. Cir. 2007). By contrast, the Third, Seventh, and Eighth Circuits hold the opposite—that whether a public employee spoke as a citizen or as an employee is a question of fact for a jury to resolve. *See Reilly v. City of Atlantic City*, 532 F.3d 216, 227-228 (3d Cir. 2008); *Davis v. Cook Cnty.*, 534 F.3d 650, 653 (7th Cir. 2008); *Casey v. City of Cabool*, 12 F.3d 799, 803 (8th Cir. 1993). And the Ninth Circuit holds that this is a mixed question of law and fact. *See Posey v. Lake Pend Oreille Sch. Dist. No. 84*, 546 F.3d 1121, 1129 (9th Cir. 2008).

This conflict illustrates the need for further clarity from the Court on *Garcetti*'s job duties holding. While there was "no dispute that Ceballos' internal memorandum had been written in execution of Ceballos's official employment responsibilities," most cases are not so clear. *Posey*, 546 F.3d at 1127; *see id.* ("Here there is room for precisely such debate regarding whether [the employee] wrote and delivered his letter in execution of his official

employment duties."). As construed currently, *Garcetti* is ill-suited to serve as a general rule governing public employee speech.[3] Its "bright-line rule [is] designed to automatically privilege the interests of the government employer at the expense of the speaker and the public." Flynn, *supra* note 2 at 772. *Garcetti*'s job duties test should not be a hard and fast rule that places a burden on employees to prove a compelling reason for deviation. Rather the general rule should be that public employee speech is protected by the First Amendment, unless the employer can demonstrate compelling justification that the speech deserves no protection *vis-à-vis* its relation to an employee's job duties.

II. *GARCETTI*'S BROAD JOB DUTIES TEST IS QUICKLY ERODING THE FREEDOM OF PUBLIC EMPLOYEES TO SPEAK.

Garcetti's rule—that public employees enjoy no First Amendment protection for speech related to their job duties—has led to results offensive to the Constitution, such as the case at bar. Even aside from the question of whether the job duties question is one of fact or law, the lower courts interpret *Garcetti*'s rule as one that applies in every situation unless the employee can articulate a compelling

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[3] *See* Flynn, *supra* note 2 at 769 ("[I]nstead of adhering to a doctrine that allows courts to make a meaningful assessment of whether a public employee had actually spoken as a citizen, the *Garcetti* Court opted for an inflexible dichotomy. To the *Garcetti* Court, if a public employee spoke in her role as an employee, she could not have been speaking concurrently as a citizen. But the Court should have resisted the urge to put the speaker in one box or the other.").

exception. But, as in this case, those exceptions are few and far between. In other words, while *Garcetti* claims that public employees do not forfeit all their First Amendment rights, the lack of clarity in the holding has resulted in a rule where public employees enjoy virtually no First Amendment protection because much of their speech can be classified as job-related. The case at bar and examples from faculty speech cases demonstrate these problems and the need for clarity from the Court.

A. The *Garcetti* Job Duties Test Sanctions Employer Loyalty Oaths.

In the decision below, Mr. Lane's truthful courtroom testimony about things he learned on the job, which was compelled by subpoena, led his employer to fire him. The Eleventh Circuit, applying *Garcetti*, allowed the employer to broadly define Lane's job duties and denied Lane First Amendment protection because his testimony "owe[d] its existence" to his professional responsibilities. Pet. App. 5a; *see also Garcetti*, 547 U.S. at 421-22.

The conclusion of the Eleventh Circuit in this case and other circuits allows public employers to tailor employee's job duties to avoid liability. In fact, much like the game Six Degrees of Kevin Bacon, the Eleventh Circuit's ruling shows that if an employer can find a way to connect an employee's speech to his job duties, even if far removed, then that employer is justified in taking whatever action necessary to punish the employee. *See, e.g., Abdur-Rahman v. Walker*, 567 F.3d 1278, 1289-90 (11th Cir. 2009)

(Barkett, J., dissenting) ("[T]he majority broadly applies *Garcetti*'s 'owes its existence' language to eliminate constitutional protection for *all* of the employees' statements regarding [sewer overflow], and in doing so effectively nullifies the Court's admonishment that the fact that speech relates to the subject matter of the employee's job is non-dispositive.") (emphasis in original). Instead of allowing public employers to create job descriptions sufficiently broad to regulate all of their employees' speech, this Court should clarify that *Garcetti* applies only in particular situations, not that it always applies unless one can find a compelling exception. In other words, the Court should return to the balancing test adopted in *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968). *Garcetti*'s rule that public employees deserve no First Amendment protection when doing their jobs only makes sense in limited situations where public employees disrupt the mission objectives of their employer.

The Eleventh Circuit's ruling in this case recalls efforts by public employers last century to impose loyalty oaths on employees. In the 1950s and 1960s, this country experienced a widespread effort to require public employees, especially those employed by educational institutions, to swear loyalty oaths to the state and reveal groups with which they associated. *Connick v. Myers*, 461 U.S. 138, 144 (1983). This Court roundly rejected those efforts as infringing the fundamental liberties of speech and association. *See, e.g., Wieman v. Updegraff*, 344 U.S. 183 (1952) (holding state cannot require employees to establish loyalty by denying past affiliation with Communists).

"[N]either federal nor state government may condition employment on taking oaths that impinge on rights guaranteed by the First and Fourteenth Amendments respectively, as for example those relating to political beliefs." *Cole v. Richardson*, 405 U.S. 676, 680 (1972) (citing *Law Students Civil Rights Research Council v. Wadmond*, 401 U.S. 154 (1971); *Baird v. State Bar of Arizona*, 401 U.S. 1 (1971); *Connell v. Higginbotham*, 403 U.S. 207, 209 (1971) (Marshall, J., concurring in result)). Derivative of that axiom is a commitment that public employment may not "be conditioned on an oath that one has not engaged, or will not engage, in protected speech activities" including criticism of "institutions of government." *Cole*, 405 U.S. at 680 (citing cases).

As this Court restated last term, the government "may not deny a benefit [such as public employment] to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit." *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2328 (2013) (citation and quotation marks omitted). If the government is providing money to an organization, it cannot require that organization to adopt a particular message on an issue of public concern. *See id.* at 2330 ("By demanding that funding recipients adopt—as their own—the Government's view on an issue of public concern, the condition by its very nature affects 'protected conduct outside the scope of the federally funded program.'") (citation omitted). In the same way, if the government is providing someone with a job, it cannot require that person to adopt a particular viewpoint outside the workplace, even when that

viewpoint concerns facts learned on the job, and especially when that viewpoint addresses an issue of public concern.

The Eleventh Circuit's decision below contradicts that precedent and empowers government employers to define job duties so broadly that employees cannot comment on any public concern, whether inside or outside the workplace. Mr. Lane was subject to nothing short of a political litmus test (after all, the Alabama state senator at the center of the fraud charges pledged to get him fired) when he was forced to testify in court. Pet. App. 2a. Essentially, the Eleventh Circuit implied that "a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind." *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 634 (1943). Government employees should not fear reprisal for exercising their constitutional rights and obligations outside the workplace.

B. The *Garcetti* Job Duties Test Threatens Academic Freedom.

Faculty speech provides another example of why the Court should clarify and limit *Garcetti*. "The essentiality of freedom in the community of American universities is almost self-evident . . . . Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967).

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."

Id. (quotation marks omitted). In fact, the Court in *Garcetti* acknowledged the "additional constitutional interests that [were] not fully accounted for by" its ruling. 547 U.S. at 425. Thus, the Court declined to "decide whether the [job duties] analysis . . . would apply in the same manner to a case involving speech related to scholarship or teaching." *Id.*

Despite the Court's previous clarion calls to protect faculty speech and academic freedom, since *Garcetti*, the lower courts have struggled with how much First Amendment protection faculty deserve. For example, the University of North Carolina-Wilmington denied a promotion to a faculty member because the university disagreed with the content of his speech in columns written for the conservative website Townhall.com. *Adams v. Trs. of Univ. of N.C.-Wilmington*, 640 F.3d 550 (4th Cir. 2011). The Fourth Circuit ruled correctly that *Garcetti* should not "apply in the academic context of a public university" and that the professor could receive First Amendment protection. *Id.* at 562; *see also id.* at 564 ("Applying *Garcetti* to the academic work of a public

university faculty member under the facts of this case could place beyond the reach of First Amendment protection many forms of public speech or service a professor engaged in during his employment.").

Following the Fourth Circuit's lead, the Ninth Circuit considered recently whether a professor at Washington State University who distributed a pamphlet and drafts of an in-progress book could assert a First Amendment retaliation claim against his employer. *Demers v. Austin*, No. 11-35558, --- F.3d ---, 2014 WL 306321, at *1 (9th Cir. Jan. 29, 2014). The court held that *Garcetti* does not apply to "teaching and academic writing that are performed 'pursuant to the official duties' of a teacher and professor." *Id.* at *7. Thus, the professor's pamphlet and book drafts were protected speech.

In contrast to the Fourth and Ninth Circuits, other courts have not protected public university faculty speech to the same degree. The Sixth Circuit, citing *Garcetti*, refused to protect the speech of a librarian at The Ohio State University. The librarian participated in a voluntary committee charged with selecting a book that all freshmen would read together. *Savage v. Gee*, 665 F.3d 732, 738 (6th Cir. 2012). Despite the fact that he discussed a matter of public concern that involved both teaching and scholarship, the Sixth Circuit labeled his speech only "loosely" related to "academic scholarship," and, therefore, unprotected. *Id.* at 739.

The Seventh Circuit denied First Amendment protection to a professor at the University of

Wisconsin—Milwaukee who asserted that the university retaliated against him for complaining about the university's use of grant money. *Renken v. Gregory*, 541 F.3d 769, 770 (7th Cir. 2008). Renken's job duties included "teaching, research, and service to the University," all things arguably exempted from *Garcetti*'s holding. *Id.* at 773. Despite that, the court ruled that his complaint about the use of grant money for *research* was not entitled to First Amendment protection. *Id.* at 774.

Courts have even ruled that professors deserve no First Amendment protection when they advise students, *Gorum v. Sessoms*, 561 F.3d 179, 186 (3d Cir. 2009), participate in faculty meetings, *Sadid v. Vailas*, 936 F. Supp. 2d 1207, 1225-26 (D. Idaho 2013), or speak up on departmental hiring decisions, *Isenalumhe v. McDuffie*, 697 F. Supp. 2d 367, 378-79 (E.D.N.Y. 2010). But these are job duties where faculty should have First Amendment protection because it affects their ability to conduct scholarship and teaching and contribute to the marketplace of ideas free of government restraint.

The point is that *Garcetti*'s holding is being interpreted too broadly by many lower courts. Employers are able to devise job descriptions as broad as they want. As a result, employees are left with little ability to speak up, even on matters of public concern. And courts are blindly applying *Garcetti*, even when the results curtail the ability of someone to perform some of the most important public tasks in our Republic—testifying truthfully in court and teaching in public universities.

III. THE FIRST AMENDMENT SHOULD PROTECT PUBLIC EMPLOYEES WHO SPEAK ON MATTERS OF PUBLIC CONCERN, UNLESS THE GOVERNMENT CAN DEMONSTRATE A COMPELLING INTEREST FOR LIMITING THEIR SPEECH.

This Court should clarify that *Garcetti* was aimed at addressing the ability of public employers to make sure their employees do not thwart an employer's objective. *See Garcetti*, 547 U.S. at 422-23 (recognizing employers have need to "ensure that their employees' official communications are accurate, demonstrate sound judgment, and promote the employer's mission"). The Constitution places a high value on freedom of speech; thus, the general rule should be that a public employee may speak freely on a matter of public concern, unless the employer shows that doing so disrupts implementation of the employer's business operations. *See Weintraub*, 593 F.3d at 207 (Calabresi, J., dissenting) ("By contrast, when an employee's speech is not part of the implementation of the employer's business operations, the employer does not depend on 'substantive consistency and clarity,' in that speech. Instead, employers may well benefit from a narrowly defined exception to First Amendment protection") (quoting *Garcetti*, 547 U.S. at 422); *Abdur-Rahman*, 567 F.3d at 1287 (Barkett, J., dissenting) ("the sacrifice of First Amendment rights by public employees in the interest of managerial efficiency is the exception, not the rule"). This would return public employee speech jurisprudence to the workable *Pickering* balancing test.

The currently undefined job duties test, however, is untenable. It gives employers a get-out-of-jail-free card: unless employees can provide a compelling reason for protecting their speech, employers may take any adverse employment action and not fear accountability under the First Amendment because they can define the employee's speech as part of his job duties. *See Weintraub*, 593 F.3d at 205 (noting the current job duties test is too broad). Public employees deserve more protection; after all, they do not forfeit their First Amendment rights when they accept public employment. *Garcetti*, 547 U.S. at 417.

CONCLUSION

The Court should take the opportunity to rein in *Garcetti*'s broad job duties test and clarify that public employees retain First Amendment rights to speak on matters of public concern, unless they disrupt implementation of public employers' business operations. Without clarity from this Court, decisions like the one below will continue to distort First Amendment jurisprudence.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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Supreme Court of the United States

EDWARD LANE,

Petitioner,

v.

STEVE FRANKS, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF ALABAMA IN SUPPORT OF PETITIONER

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Action Apartment Ass'n v. City of Santa Monica, 163 P.3d 89 (Cal. 2007)	23
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Bio/Basics Int'l Corp. v. Ortho Pharm. Corp., 545 F. Supp. 1106 (S.D.N.Y. 1982)	22
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Blair v. United States, 250 U.S. 273 (1919)	8
Bochetto v. Gibson, 860 A.2d 67 (Pa. 2004)	24

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DeLong v. Yu Enters., Inc.,
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DeSantis v. Emps. Passaic Cnty. Welfare Ass'n, 568 A.2d 565 (N.J. Super. Ct. App. Div. 1990)..... 22

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Gertz v. Robert Welch, Inc.,
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Jenkins v. S. Ry. Co.,
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Letourneau v. Hickey,
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United States v. Calandra,
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United States v. Nixon,
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Worrell v. Henry,
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Fed. R. Civ. P. 45(b)(1) 18

Fed. R. Civ. P. 45(c)(1)(A) 17

OTHER AUTHORITIES

8A Wright & Miller, Federal Practice and Procedure § 2131 (3d ed. 2010) 16

Patricia Sullivan, *Lift Every Voice: The NAACP and the Making of the Civil Rights Movement* (2009) 12

Restatement (Second) of Torts § 590A 23

Restatement (Second) of Torts § 652D 27

TABLE OF AUTHORITIES—Continued

Page(s)

Richard Kluger, *Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality* (2004)..... 12

Van Vechten Veeder, *Absolute Immunity in Defamation: Judicial Proceedings*, 9 Colum. L. Rev. 463 (1909)..... 11, 21, 22, 23

INTEREST OF *AMICI CURIAE*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The American Civil Liberties Union of Alabama is a state affiliate of the national ACLU. Since its founding in 1920, the ACLU has appeared before this Court in numerous free speech cases, both as direct counsel and as *amicus curiae*, including a series of cases that have helped define the free speech rights of public employees. The ACLU has a strong interest in ensuring that all citizens are protected when they make sworn statements in a court of law.

SUMMARY OF ARGUMENT

Amici agree with petitioner that the First Amendment prohibits the government from firing an employee because he testified in response to a subpoena at a federal public corruption trial.[2] The protection for compelled testimony, however, is less a defined category than an illustration of a larger point. The First Amendment protects *all* sworn statements by public employees as part of judicial proceedings—whether compelled by a subpoena or voluntary. Distinguishing voluntary and compelled testimony would disrupt the orderly operation of the American

---

[1] The parties' blanket consents to the filing of *amicus* briefs are on file with the Clerk of the Court. None of the parties authored this brief in whole or in part, and no one other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

[2] *Amici* also agree that the respondents are not entitled to qualified immunity.

judicial system and deter witnesses from coming forward. It would also conflict with an unbroken, centuries-long common-law tradition immunizing all witnesses who give testimony under oath as part of judicial proceedings. Affidavits and other voluntary statements by public employees should therefore receive the same First Amendment protection as subpoenaed testimony.

First, this Court has repeatedly emphasized that sworn testimony is indispensable to the truth-seeking function at the heart of the judicial process. This inherent public function of sworn judicial testimony is in no way altered because the testimony is offered by a public employee or because it is voluntary rather than compelled. To the contrary, whether a statement is technically compelled often reflects nothing more than chance.

This Court has also been clear that "[t]he duty to testify [is] a basic obligation that every citizen owes his Government." *United States v. Calandra*, 414 U.S. 338, 345 (1974). Accordingly, when a public employee offers sworn judicial testimony, he speaks "as a citizen on a matter of public concern," *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006), regardless of the subject matter of the testimony.

Because all sworn judicial statements reflect speech by a citizen on a matter of public concern, this Court should not announce a rule that turns on whether a statement is compulsory or voluntary. Such a distinction would serve no purpose beyond creating a perverse incentive for litigants (and courts) to expend substantial time and money on compulsory process for testimony that otherwise would be offered voluntarily. More troubling, such a rule would deter

public employees from coming forward with information in the first place, depriving litigants and the courts of relevant, and often essential, evidence.

Second, recognizing First Amendment protection for sworn statements in judicial proceedings is consistent with the longstanding common-law tradition according such statements absolute immunity from defamation liability. *See Briscoe v. LaHue*, 460 U.S. 325, 330-33 (1983). The common-law tradition of immunity for sworn judicial testimony applies to private citizens and public employees alike, whether the statement is compelled or voluntary. And while this Court has regularly held that the First Amendment protects more speech than the common law, this Court has never held the converse to be true. To the contrary, in case after case the Court has refused to create exceptions to the First Amendment for categories of speech that were protected at common law. It should not create an exception in this case, either.

ARGUMENT

I. The First Amendment Protects All Sworn Statements in Judicial Proceedings

"[A] citizen who works for the government is nonetheless a citizen," and a public employer may not "leverage the employment relationship to restrict . . . the liberties employees enjoy in their capacities as private citizens." *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006). It is thus "well settled" that the government cannot retaliate against an employee for exercising his "constitutionally protected interest in freedom of expression." *Id.* at 413 (quoting *Connick v. Myers*, 461 U.S. 138, 142 (1983)). Rather, the First Amendment protects public employees whenever they

speak (1) on "a matter of public concern" (2) in their capacity "as a citizen." *Id.* at 418.

As petitioner shows, a public employee's compelled testimony at a federal criminal trial easily meets these two criteria. But the same is true for any person participating under oath in the judicial process. Sworn statements relevant to a judicial proceeding always advance the judiciary's truth-seeking function, and always fulfill an individual's civic responsibility. There is no legal basis for distinguishing between voluntary and compelled testimony under the *Garcetti* framework. And such a distinction would create intractable practical problems. It would disrupt the process for acquiring evidence and undermine the free flow of information that is critical to the judicial process. Constitutional protections would in the end be triggered largely as a function of chance.

A. A Witness Giving a Sworn Statement in a Judicial Proceeding Is Always Speaking as a Citizen on a Matter of Public Concern

By their very nature, sworn judicial statements of every kind "address[] a matter of public concern." *Garcetti*, 547 U.S. at 423. "Speech deals with matters of public concern when it can 'be fairly considered as relating to any matter of political, social, or other concern to the community.'" *Snyder v. Phelps*, 131 S. Ct. 1207, 1216 (2011) (quoting *Connick*, 461 U.S. at 146)). In deciding whether this standard is met, this Court looks not just at "content," but also at "form" and "context." *Id.*

In the case of sworn statements, the "form" (sworn) and "context" (a judicial proceeding) alone establish the requisite, indeed paramount, public interest. This

Court has emphasized that the development of "all relevant facts" is essential to the "integrity of the judicial system and public confidence in the system." *United States v. Nixon*, 418 U.S. 683, 709 (1974). The integrity of the judicial system, in turn, is "conservative of all other rights, and lies at the foundation of orderly government." *Chambers v. Balt. & Ohio R.R. Co.*, 207 U.S. 142, 148 (1907). Only a judicial system fully equipped to ferret out the truth can truly secure "[t]he right to sue and defend in the courts," a right that is "one of the highest and most essential privileges of citizenship." *Id.*

It is for these reasons that, "[f]or more than three centuries," our legal tradition has recognized the "fundamental maxim" that "the public . . . has a right to every man's evidence." *United States v. Bryan*, 339 U.S. 323, 331 (1950); *accord Piemonte v. United States*, 367 U.S. 556, 559 n.2 (1961) (quoting 12 Hansard's Debates 693). "[E]xceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth." *Nixon*, 418 U.S. at 710; *see also Univ. of Pa. v. EEOC*, 493 U.S. 182, 189 (1990). And the "predominant principle" of the American judicial process is to "utiliz[e] all rational means for ascertaining truth." *Nixon*, 418 U.S. at 710 n.18 (quoting *Elkins v. United States*, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting)). As Justice White explained in *Imbler v. Pachtman*, 424 U.S. 409 (1976):

> The ability of courts . . . to separate truth from falsity, and the importance of accurately resolving factual disputes in criminal (and civil) cases are such that those involved in judicial proceedings should be given every encouragement to make a

> full disclosure of all pertinent information within their knowledge.

Id. at 439 (White, J., concurring in the judgment) (internal quotation marks omitted).

A public employee's sworn statement in a judicial proceeding is a matter of public concern to the same extent as the statement of any citizen. All sworn judicial statements advance the search for truth and ensure the integrity of the judicial process. On many subjects, public employees are the "members of [the] community most likely to have informed and definite opinions," most privy to relevant evidence, and best situated to assist the jury and the judge in exercising their constitutional responsibilities. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 572 (1968); *see also Bd. of Cnty. Comm'rs v. Umbehr*, 518 U.S. 668, 674 (1996); *Kinney v. Weaver*, 367 F.3d 337, 361 (5th Cir. 2004) (en banc). At a minimum, encouraging the truthful testimony of a public employee is of no *lesser* concern to the community than promoting such testimony from an ordinary citizen.

In this particular case, the content of petitioner's testimony—the corruption of a state legislator—independently establishes that the testimony qualifies as speech on a matter of public concern. *See* Pet. Br. 18-19. But a case-by-case examination of content is unnecessary in light of the paramount importance of sworn truthful testimony as a whole to our system. The form and context render the speech of inherent public concern. *See United States v. Alvarez*, 132 S. Ct. 2537, 2546 (2012) ("Unlike speech in other contexts, testimony under oath has the formality and gravity necessary to remind the witness that his or her statements will be the basis for official governmental action, action that often affects the rights and liberties

of others."); *Nixon*, 418 U.S. at 710; *Bryan*, 339 U.S. at 331; *see also Reilly v. City of Atlantic City*, 532 F.3d 216, 229 (3rd Cir. 2008) ("[T]estimony is offered 'in a context that is inherently of public concern . . . .'"); *Johnston v. Harris Cnty. Flood Control Dist.*, 869 F.2d 1565, 1578 (5th Cir. 1989) (same).

Inquiring into the content of a sworn truthful statement would create an intolerable degree of unpredictability and would chill critical speech. A witness testifying should be concerned with speaking the truth, not whether a given topic or line of testimony will make his boss angry. And an employee with knowledge that could assist a judge or jury in administering the laws cannot be forced to bet her job on how a different judge, acting with the benefit of hindsight, will assess the public interest in the original proceeding. Rather, the employee's participation in the judicial fact-finding process should always be protected by the First Amendment.[3]

For similar reasons, sworn statements by a public employee in a judicial proceeding always satisfy the speech "as a citizen" portion of the *Garcetti* test,

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[3] This argument does not implicate the Court's observation in *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488 (2011), that employees who are *parties* to lawsuits might "interfere with the efficient and effective operation of government," *id.* at 2495, by, for example, "us[ing] the courts to pursue personal vendettas or to harass members of the general public," *id.* at 2496, or by "circumvent[ing]" the applicable "statutory and regulatory mechanisms" to file lawsuits "based on ordinary workplace grievances," *id.* at 2497. Whether the act of filing a lawsuit is itself protected is a distinct question from whether a sworn statement in a judicial proceeding is protected. And how speech might fare under the balancing portion of the *Pickering* test does not alter the conclusion that speech given under oath in a judicial proceeding is protected by the First Amendment in the first place.

because the employee necessarily provides such statements in her capacity as a citizen. This Court has said so in countless ways and countless cases. For example: "The duty to testify has long been recognized as a basic obligation that every citizen owes his Government." *United States v. Calandra*, 414 U.S. 338, 345 (1974). "Every citizen of course owes to his society the duty of giving testimony to aid in the enforcement of the law." *Piemonte*, 367 U.S. at 559 n.2. "It is also beyond controversy that one of the duties which the citizen owes to his government is to support the administration of justice by attending its courts and giving his testimony whenever he is properly summoned." *Blackmer v. United States*, 284 U.S. 421, 438 (1932). "The personal sacrifice involved [in giving testimony] is a part of the necessary contribution of the individual to the welfare of the public." *Blair v. United States*, 250 U.S. 273, 281 (1919).

Hence when an individual—public employee or not—offers a sworn statement in a judicial proceeding, that individual is fulfilling a core civic duty shared among all members of society. "[This] duty of citizenship is not vitiated by one's status as a public employee." *Reilly*, 532 F.3d at 231; *accord Chrzanowski v. Bianchi*, 725 F.3d 734, 741 (7th Cir. 2013); *Jackler v. Byrne*, 658 F.3d 225, 239 (2d Cir. 2011).

The Eleventh Circuit badly misread *Garcetti* in holding that petitioner did not speak as a citizen because he "testified *about* his official activities," and because "the *subject matter* of [petitioner's] testimony touched only on acts he performed as part of his official duties." *Lane v. Cent. Ala. Cmty. Coll.*, 523 F. App'x 709, 712 (11th Cir. 2013) (per curiam) (emphases added); *see also* Pet. Br. 6, 28-29. The question is not

whether public employment is the source of the information, but whether the employee acts as a citizen *when conveying* that information. *Garcetti* could not have been more clear: the "controlling factor" is *not* whether speech "concern[s] the subject matter of [an individual's] employment" but rather whether the "expression[]" itself was made "pursuant to . . . official duties." 547 U.S. at 421. *Pickering*, too, makes this plain: the Court held that a teacher's letter to the editor was protected speech even though the letter concerned information the teacher had learned on the job. 391 U.S. at 566. The Eleventh Circuit got the cases backward: under its approach it made no difference whether petitioner expressed his speech in courtroom testimony, in a phone call to a newspaper reporter, or at a political protest.

Properly applied, *Garcetti* itself establishes that those who provide judicial testimony are engaged in speech as a citizen. *Garcetti* held that a memorandum from an assistant district attorney to his supervisor did not constitute speech as a citizen because the Court found no "relevant analogue" outside the workplace. 547 U.S. at 424. That is, distributing an internal memorandum on the merits of a prosecution is not, in *Garcetti*'s view, "the kind of activity engaged in by citizens who do not work for the government." *Id.* at 423. Precisely the opposite is true in the case of judicial testimony. Private citizens testify every day in every state across the nation. Far from reflecting speech that is peculiar to public employment, judicial testimony is a paradigmatic example of speech that has its roots in citizenship.

To be sure, certain public employees (say FBI agents, lab technicians, or agency representatives under Fed. R. Civ. P. 30(b)(6)) may in some situations

testify at the request or command of their employer and on behalf of their employer. Once the employee takes the stand, however, he is acting not only as an employee, but also as a citizen. He has a legal duty as a citizen—owed to the court and independent of his duty to his employer—to answer truthfully every question the court finds relevant. It would be dangerous indeed, and contrary to public policy, to permit his employer to then fire him for giving a truthful response. In fact, if anything, the public has an especially strong interest in according protection to witnesses who regularly testify on behalf of the government. Juries give great weight to the testimony of such witnesses, yet the witnesses are at the same time at unique risk of reprisal for giving truthful testimony that is adverse to the government's interests. "A forensic analyst responding to a request from . . . law enforcement," for example, "may feel pressure—or have an incentive—to alter the evidence in a manner favorable to the prosecution." *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 318 (2009).

That is not to say that the government would have no recourse if, say, its witness "testifl[ied] poorly," Burrow Br. 24, or inappropriately revealed confidential, irrelevant information on the stand. The government would be free to argue as part of the *Pickering* balancing inquiry that the employee's testimony had interfered with government operations to an extent that justified discharge, notwithstanding the substantial public interest in truthful testimony. But such arguments are not relevant to whether the witness spoke as a citizen on a matter of public concern in the first place.

In any event, this Court need not decide how a rule that judicial statements are always protected speech

should apply in situations where an employee is testifying at the request of his employer as part of his ordinary job duties. As petitioner shows, he did not testify as part of his job duties. *See* Pet. Br. 20-22, 27-28.

B. Nothing Turns on Whether a Statement Is Compelled or Voluntary

Because the First Amendment protects all sworn statements in judicial proceedings by public employees, this Court should not hold that anything turns on whether the statements were *compelled*. The public value of sworn testimony does not depend on whether truthful testimony is secured through a mandatory or voluntary appearance. And public policy and practical considerations counsel strongly against establishing such a distinction.

1. *Compulsion Is Irrelevant to the Applicable Legal Standard*

A sworn statement relevant to a judicial proceeding is speech on a "matter of public concern" whether or not it is compelled. As discussed, the public interest at stake is the judicial truth-seeking function, which depends on encouraging anyone with relevant information to come forward. *Nixon*, 418 U.S. at 709, 710 n.18. The public good served by testimony thus turns on the fact of the testimony—that it is relevant to help resolve the underlying legal dispute—not the means by which the testimony is procured. "The object of [a subpoena] is merely to secure attendance, and a witness who gives his testimony voluntarily is performing a public function no less than when he testifies upon compulsion." Van Vechten Veeder, *Absolute Immunity in Defamation: Judicial Proceedings*, 9 Colum. L. Rev. 463, 476-77 (1909).

This Court need look no further than its seminal decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), to appreciate the public function served by all testimony of public employees, and to see why it is absolutely essential to protect such testimony. At least six public employees testified at the *Brown* trial on the need to end segregation in public schools. One did so "over the direct protest" of his supervisor, providing critical factual information about disparities between the City of Topeka's white and African-American schools. Richard Kluger, *Simple Justice: The History of* Brown v. Board of Education *and Black America's Struggle for Equality* 413, 415 (2004). Others testified to scientific evidence establishing that segregated schools instilled a "sense of inferiority" that affected how well minority students learn—testimony that shaped this Court's decision. *Id.* at 416-17, 421-22; Patricia Sullivan, *Lift Every Voice: The NAACP and the Making of the Civil Rights Movement* 409 (2009); *see also Brown*, 347 U.S. at 494. We can't be sure whether this testimony was secured by subpoena or not—but there is no apparent reason why that should have mattered to the question whether to protect the employees against retaliation.

Similarly, the distinction between voluntary and compelled testimony has no bearing on whether an employee is acting "as a citizen." This Court has held that "*every* citizen . . . owes to his society the duty of giving testimony to aid in the enforcement of the law." *Piemonte*, 367 U.S. at 559 n.2 (emphasis added). It would be perverse to hold that public employees act as citizens only when they are forced to fulfill their civic duty, and not when they fulfill that duty of their own accord. This Court should thus recognize that whenever a public employee offers relevant testimony in a judicial proceeding, the employee acts as a citizen,

on matters of public concern, and is entitled to First Amendment protection.[4]

Highlighting the illogic of drawing a distinction between compelled and other statements is the fact that, for many witnesses, compulsion is arbitrary or a function of chance. In both civil and criminal litigation, attorneys frequently issue subpoenas to witnesses who would have voluntarily attended even absent a subpoena. Conversely, witnesses who do not wish to testify may show up under threat (but not issuance) of a subpoena. Courts should not have to resolve satellite issues involving matters outside the record to determine the reason that a witness gave a statement or appeared. The important thing is that the witness is there—and willing to tell the truth.

The courts of appeals have accordingly treated both compelled and voluntary testimony as protected speech. The Third and Fifth Circuits have held that all judicial statements, whether secured by compulsion or not, are *per se* a matter of public concern. *Swartzwelder v. McNeilly*, 297 F.3d 228, 238 (3d Cir. 2002); *Green v. Phila. Hous. Auth.*, 105 F.3d 882, 887 (3d Cir. 1997); *Johnston*, 869 F.2d at 1578. "Ensuring that truthful testimony is protected by the First Amendment promotes the individual and societal interests served when citizens play their vital role in the judicial process." *Reilly*, 532 F.3d at 231 (internal quotation marks omitted); *accord Green*, 105 F.3d at 887; *Johnston*, 869 F.2d at 1578. And there is "no reason why a voluntary appearance would

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[4] Unsurprisingly, many (though not all) of this Court's statements on the duty of a citizen to testify arise in the context of compulsion. But that is true only because voluntary testimony is unlikely to produce controversy about the obligation to testify, not because voluntary testimony is any less an act of civic duty.

eliminate the public interest" of such testimony. *Green*, 105 F.3d at 887. Post-*Garcetti*, the Third Circuit has further confirmed that, "[w]hen a government employee testifies truthfully, s/he is not 'simply performing his or her job duties'; rather, the employee is acting as a citizen." *Reilly*, 532 F.3d at 231 (citation omitted) (quoting *Garcetti*, 547 U.S. at 423).

The Second, Seventh, and Tenth Circuits have similarly recognized the compelling justifications for treating all testimony, voluntary or otherwise, as speech offered by the witness as a citizen on a matter of public concern. *See Matrisciano v. Randle*, 569 F.3d 723, 731 (7th Cir. 2009); *Worrell v. Henry*, 219 F.3d 1197, 1205 (10th Cir. 2000); *Kaluczky v. City of White Plains*, 57 F.3d 202, 210 (2d Cir. 1995). In *Worrell*, the Tenth Circuit explained that "[a]ffording constitutional protection to the truthful testimony of public employees"—there, voluntary expert testimony for the defense in a capital murder trial—"protects both employees' interest in free expression and the judicial system's interest in arriving at the truth." 219 F.3d at 1205.[5]

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[5] The State of Alabama erroneously asserts that numerous courts of appeals have "rejected" a *per se* rule treating all compelled judicial testimony as speech made as a citizen on a matter of public concern. Burrow Br. at 22 n.3. The Second, Ninth, and Tenth Circuits have expressly reserved deciding whether a *per se* rule is appropriate. *See Clairmont v. Sound Mental Health*, 632 F.3d 1091, 1103 (9th Cir. 2011); *Deutsch v. Jordan*, 618 F.3d 1093, 1099 n.1 (10th Cir. 2010); *Catletti ex rel. Estate of Catletti v. Rampe*, 334 F.3d 225, 230 (2d Cir. 2003). And the Eighth Circuit's holding that one employee's testimony did not involve a matter of public concern was driven by uniquely disturbing facts—a high school teacher had testified at his criminal trial that he believed it was permissible to have a sexual relationship with a minor. *Padilla v. S. Harrison R-II Sch. Dist.*,

Some courts of appeals have suggested that whether a statement is voluntary might be relevant to the balancing of the private and governmental interests under *Pickering*. *See, e.g.*, *Green*, 105 F.3d at 888; *cf. Hoover v. Morales*, 164 F.3d 221, 227 (5th Cir. 1998). Whatever the merits of that argument, voluntariness has no bearing on whether the sworn statement is protected by the First Amendment in the first place.

2. *Limiting First Amendment Protection to Compelled Testimony Would Create Widespread and Significant Practical Problems*

The fact that the testimony in this particular case was compelled should not make it a determinative factor for all cases. It is not just that such a distinction is legally unsustainable under the letter and purpose of the *Garcetti* framework. Carving out voluntary testimony would also affirmatively undermine the truth-seeking function at the heart of the judicial system, not to mention the First Amendment values that the *Pickering-Connick-Garcetti* line of cases aim to protect. At bottom, such a holding would be fundamentally inconsistent with this Court's admonition that "[t]he policy of the law must be to encourage testimony." *Yates v. United States*, 355 U.S. 66, 73 (1957).

First, federal and state courts across the United States regularly rely on voluntary affidavits to resolve issues in civil litigation. Among countless examples, see *City of Erie v. Pap's A.M.*, 529 U.S. 277, 302-03

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181 F.3d 992 (8th Cir. 1999). In any event, the court got it wrong—the testimony was a matter of public concern, even if the school district could still discharge the teacher under *Pickering* balancing.

(2000) (Scalia, J., concurring in the judgment); *Nat'l Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 185 (1988); *Roth v. Dep't of Justice*, 642 F.3d 1161, 1169 (D.C. Cir. 2011); *Hartford Cnty. v. Saks Fifth Ave. Distribution Co.*, 923 A.2d 1, 10 (Md. 2007); *In re C.H.C.*, 331 S.W.3d 426, 430 (Tex. 2011). The Court should not create a rule that would jeopardize a practice so ubiquitous and so central to the orderly operation of the judicial system.

Second, and relatedly, giving greater protection to compelled statements would encourage witnesses to demand compulsory process where it would otherwise be unnecessary, making litigation more costly and time-consuming. In the federal system, for example, compelling an individual to attend a deposition or answer written questions often requires the involvement of a judge, particularly early in the litigation. Fed. R. Civ. P. 30(a), 31(a). And subpoenaing a witness to testify via oral deposition, where a simple voluntary affidavit would do, entails considerable expense—travel, the hiring of a reporter, and attorney time, among other things. Although Rule 31 allows "depositions by written questions," that procedure too is considerably more complicated, time-consuming, and expensive than obtaining a sworn affidavit. *See* Fed. R. Civ. P. 31(a)(5), (b)(1)-(3); *see also* Fed. R. Civ. P. 30(c), (e), (f); 8A Wright & Miller, Federal Practice and Procedure § 2131 (3d ed. 2010) (depositions by written question are "cumbersome" and "rarely used").

Third, leaving voluntary testimony unprotected—even leaving the issue open—would discourage witnesses from coming forward in the first place. A public official who has information that is relevant to an ongoing public corruption investigation *may* come forward and speak to the FBI if she can be confident

that the government will later compel her testimony under subpoena, so as to insulate her from retaliatory action. But far more likely, uncertainty in the law—combined with the fact that the employee's job hangs in the balance—will dissuade the employee from coming forward altogether. Most public employees are laymen who will not even realize that it may be possible to obtain compelled process down the line. A blanket rule announced by this Court protecting all sworn testimony, on the other hand, will ensure that witnesses feel secure coming forward even if they are not yet on a party's radar screen—exactly the outcome the Court's First Amendment jurisprudence seeks to advance.

Fourth, in many cases a litigant will simply be unable to protect a public employee by supplying compulsory process—because compulsory process is not available in all situations and at all times. For example, a public employee may be perfectly willing to travel 150 miles to testify at a civil trial—but he cannot be compelled to do so by a subpoena. *See* Fed. R. Civ. P. 45(c)(1)(A) (with certain exceptions, a subpoena can only require its recipient to travel 100 miles to provide testimony). It would be bizarre indeed if the First Amendment turned on the witness's residential address.

The inability to obtain compulsory process is particularly stark in the case of prisoners, who regularly rely on voluntary sworn statements from public employees in seeking habeas relief. *See, e.g.*, *Sears v. Upton*, 130 S. Ct. 3259, 3262 & n.3 (2010) (citing school teacher's affidavit in concluding that counsel failed to conduct a constitutionally adequate penalty phase investigation in a capital case); *Johnson v. Bell*, 605 F.3d 333, 338 (6th Cir. 2010) (affidavit

from a trial witness's probation officer introduced to support *Brady* claim); *Burr v. Lassiter*, 513 F. App'x 327, 336-37 (4th Cir. 2013) (affidavits from public university professor and state coroner). It would be difficult or impossible for a *pro se* prisoner to comply with the rules for conducting a compelled deposition by written question under Rule 31—if the prisoner even has the means to hire a process server to serve the subpoena. *See* Fed. R. Civ. P. 45(b)(1). Thus, by exposing public employees to retaliation for voluntary statements, a ruling turning on compulsion would irrationally and perniciously place lower income individuals at a disadvantage in securing the truth at a trial.

Further, voluntary testimony is sometimes the only option for prisoners as a matter of law. A habeas court may require a prisoner to produce voluntary affidavits from witnesses (including a witness who is a probation officer or other public employee) before the court will review the case further or consider ordering depositions or issuing subpoenas. The statutory scheme this Court described in *Banks v. Dretke*, 540 U.S. 668 (2004), is an example. In *Banks*, the state argued that a habeas petitioner's *Brady* claim was procedurally defaulted because the petitioner had failed to seek "investigative assistance" under a Texas statute giving post-conviction courts authority to "order affidavits, depositions, interrogatories, and hearings." *Id.* at 696-97. But this Court explained that seeking such assistance would have been fruitless: the petitioner needed to produce some evidence in the first place, before the court would have issued subpoenas under the statute. *Id.* at 697. If that first witness insists on the protection of compulsion, but to obtain compulsion the prisoner needs the witness's voluntary statement, the prisoner will be

caught in a catch-22 and may never get to bring a meritorious claim.

Fifth, and finally, anything less than blanket protection risks serious intrusion by the executive branch into matters reserved to the judiciary. If a public employee may be fired for giving a sworn statement, as a practical matter she won't give the statement unless her boss wants her to. The Court cannot simply head off that outcome by protecting all compelled statements—as just explained, not all statements can be compelled, and not all witnesses will come forward if protection is uncertain. Thus, absent blanket protection, in many cases executive branch officials will ultimately control whether testimony is considered in court. And this will be so even though the testimony is truthful and relevant evidence that the witness wants to provide and the litigant wants to introduce—and, crucially, that the court wants to hear. But the Due Process Clause does not leave the power to decide what evidence may be introduced at trial to the whim of every low-level supervisor employed by a state or federal agency. Rather it assigns that power to judges who are charged with fairly and dispassionately administering the law. A decision reversing these roles would contravene the separation-of-powers doctrine, which "requires that a branch not impair another in the performance of its constitutional duties." *Loving v. United States*, 517 U.S. 748, 757 (1996). Fidelity to that doctrine instead requires this Court to foreclose the possibility that an executive branch official could deprive a court of critical evidence by threatening to fire a testifying employee.

In short, not only is there no legal reason to distinguish voluntary statements from compelled

statements under the "public concern" test, such a distinction would actively impede the flow of information that is central to our judicial system and leave many witnesses subject to retaliation for doing their civic duty. It is critical that this Court avoid a disposition that could create such a result. This Court should hold that the First Amendment protects all relevant, sworn statements by public employees in judicial proceedings.

II. This Court's Jurisprudence on Common-Law Immunity Further Demonstrates that Sworn Statements Are Always Protected by the First Amendment

A longstanding common-law tradition grants sworn statements absolute protection from defamation liability, whether or not the statement was compelled or the speaker was a public employee. And under this Court's precedents, speech that is protected at common law is also protected under the First Amendment.

A. Sworn Statements Enjoy Absolute Protection from Civil Liability

The principle that witnesses are entitled to comprehensive protection for their statements in court has roots long predating this Court's jurisprudence on speech by public employees. At common law, attorneys, parties, and most importantly witnesses enjoyed "absolute immunity" against defamation actions "for statements made in the course of a judicial proceeding." *Rehberg v. Paulk*, 132 S. Ct. 1497, 1505 (2012); *accord Briscoe v. LaHue*, 460 U.S. 325, 330-31 (1983). This rule of absolute immunity was recognized in judicial decisions as early as the sixteenth century, and was cemented in Lord Mansfield's 1772

declaration that "[n]either party, witness, counsel, jury, nor judge can be put to answer, civilly or criminally for words spoken in office." Veeder, *supra*, at 474 (quoting *R. v. Skinner*, (1772) Lofft 55); *see also Briscoe*, 460 U.S. at 330-31 (citing English common-law decisions affording damages immunity to parties and witnesses).

The reason for the common-law rule of absolute immunity is that encouraging testimony is always a matter of public concern. The leading account of the rule explains that witnesses "perform a service of the highest value in [their] disclosure of the facts," and it is therefore "indispensable . . . to the public interest that [they] speak freely and fearlessly." Veeder, *supra*, at 465, 476.[6] In other words, without immunity from subsequent liability, "[w]itnesses 'might be reluctant to come forward to testify,'" or "might be inclined to shade [their] testimony," and "the truth-seeking process . . . would be impaired." *Rehberg*, 132 S. Ct. at 1505 (quoting *Briscoe*, 460 U.S. at 333).

This common-law rule applied to all statements in judicial proceedings, whether compelled or voluntary. Veeder, *supra*, at 476 & n.41; *see also, e.g.*, *Burke v. Ryan*, 36 La. Ann. 951, 951-52 (1884) (affording absolute immunity to voluntary affidavit); *Harris v. Reams*, 2 Ohio Dec. Reprint 281, 285 (Ct. Com. Pl. 1860) (same); *Astley v. Younge*, (1759) 97 Eng. Rep. 572, 574 (K.B.) (same). As one nineteenth century judge succinctly explained, "whenever a person

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[6] This Court has repeatedly relied on Veeder's article as the definitive account of common-law immunity for speech in judicial proceedings. *Buckley v. Fitzsimmons*, 509 U.S. 259, 277 n.8 (1993); *id.* at 280 (Scalia, J. concurring); *Burns v. Reed*, 500 U.S. 478, 490 (1991); *Briscoe*, 460 U.S. at 332 n.12, 333; *Imbler*, 424 U.S. at 439 (White, J., concurring in the judgment).

testifies, either voluntarily or under process of subpoena . . . he is entitled to unqualified protection." *Perkins v. Mitchell*, 31 Barb. 461, 472 (N.Y. Gen. Term 1860). Another state-court judge of the same era provided a more detailed account of why uniform treatment was appropriate:

> [N]o book has ever yet made a distinction between witnesses who appear under process and those who appear voluntarily, as to the legal protection afforded them. There is no reason for such a distinction. It would be strange, indeed, if a witness, present in court, and being called, is sworn and testifies, is withdrawn from the protecting policy of the law, because a writ was not served on him. The object of a subpoena is to procure attendance.
>
> *Harris*, 2 Ohio Dec. Reprint at 285.

The rule applied equally to affidavits and oral statements, and to preliminary proceedings as well as testimony at trial. *See* Veeder, *supra*, at 476 n.41.[7]

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[7] This Court need not address testimony at legislative proceedings, although in that context, too, there are compelling reasons to treat all sworn statements as speech by a citizen on a matter of public concern. Legislative testimony reflects an act of "[c]itizen participation" that is "absolutely vital to ensure a fully-informed and representative legislature." *Riddle v. Perry*, 40 P.3d 1128, 1132 (Utah 2002). Thus, numerous courts have extended the common-law rule of absolute immunity in defamation actions to legislative testimony. *See, e.g., id.*; *Webster v. Sun Co.*, 731 F.2d 1, 5 (D.C. Cir. 1984); *Yip v. Pagano*, 606 F. Supp. 1566, 1571 (D.N.J. 1985); *Bio/Basics Int'l Corp. v. Ortho Pharm. Corp.*, 545 F. Supp. 1106, 1115 (S.D.N.Y. 1982); *Krueger v. Lewis*, 834 N.E.2d 457, 464 (Ill. App. Ct. 2005); *White v. Ashland Park Neighborhood Ass'n*, 2009 WL 1974750, at *9 (Ky. Ct. App. July 10, 2009); *DeSantis v. Emps. Passaic Cnty. Welfare Ass'n*, 568 A.2d 565, 567 (N.J. Super. Ct. App. Div. 1990);

Nor did the status of the witness as a public official make his testimony any less deserving of protection. To the contrary, "[a]bsolute privilege" applied to public employees and private persons alike because "[i]t is essential to the ends of justice that all persons participating in judicial proceedings . . . should enjoy freedom of speech in the discharge of their public duties or in pursuing their rights, without fear of consequences." *Imbler*, 424 U.S. at 440 (White, J., concurring in the judgment) (quoting Veeder, *supra*, at 469).

Absolute immunity for judicial testimony—of all varieties—remains the universal rule today. In all fifty states, if a witness provides sworn statements in a judicial proceeding, and those statements are relevant to the proceeding, the witness is categorically protected against liability for defamation.[8]

Jennings v. Cronin, 389 A.2d 1183, 1185 (Pa. Super. Ct. 1978); *Logan's Super Markets, Inc. v. McCalla*, 343 S.W.2d 892, 894-95 (Tenn. 1961); *see also* Restatement (Second) of Torts § 590A.

[8] *O'Barr v. Feist*, 296 So. 2d 152, 157 (Ala. 1974); *Lawson v. Helmer*, 77 P.3d 724, 727 (Alaska 2003); *Green Acres Trust v. London*, 688 P.2d 617, 621 (Ariz. 1984) (en banc); *Routh Wrecker Serv., Inc. v. Washington*, 980 S.W.2d 240, 243 (Ark. 1998); *Action Apartment Ass'n v. City of Santa Monica*, 163 P.3d 89, 95 (Cal. 2007); *Wagner v. Bd. of Cnty. Comm'rs*, 933 P.2d 1311, 1313-14 (Colo. 1997) (en banc); *Gallo v. Barile*, 935 A.2d 103, 107-08 (Conn. 2007); *Barker v. Huang*, 610 A.2d 1341, 1344-45 (Del. 1992); *Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. U.S. Fire Ins. Co.*, 639 So. 2d 606, 607-08 (Fla. 1994); *Conley v. Key*, 25 S.E. 914, 915 (Ga. 1896); *Matsuura v. E.I. du Pont de Nemours & Co.*, 73 P.3d 687, 692 (Haw. 2003); *Weitz v. Green*, 230 P.3d 743, 754 (Idaho 2010); *Thompson v. Frank*, 730 N.E.2d 143, 145 (Ill. App. Ct. 2000); *Hartman v. Keri*, 883 N.E.2d 774, 777 (Ind. 2008); *Spencer v. Spencer*, 479 N.W.2d 293, 295 (Iowa 1991); *Clear Water Truck Co. v. M. Bruenger & Co.*, 519 P.2d 682, 685 (Kan. 1974); *Morgan & Pottinger, Attorneys, P.S.C.*

This Court has further extended the common-law rule to afford witnesses categorical immunity from any liability under 42 U.S.C. § 1983 for testimony at trial or before a grand jury. *Briscoe*, 460 U.S. 325; *Rehberg*, 132 S. Ct. 1497. Indeed, in both *Briscoe* and *Rehberg*, this Court specifically rejected arguments that immunity should not shield witnesses on account of their status as public employees. *Briscoe*, 460 U.S. at

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v. Botts, 348 S.W.3d 599, 601 (Ky. 2011); *Marrogi v. Howard*, 805 So. 2d 1118, 1124-25 (La. 2002); *Dineen v. Daughan*, 381 A.2d 663, 664 (Me. 1978); *Norman v. Borison*, 17 A.3d 697, 708-09 (Md. 2011); *Aborn v. Lipson*, 256 N.E.2d 442, 443 (Mass. 1970); *Mundy v. Hoard*, 185 N.W. 872, 876 (Mich. 1921); *Matthis v. Kennedy*, 67 N.W.2d 413, 417 (Minn. 1954); *Gunter v. Reeves*, 21 So. 2d 468, 470 (Miss. 1945); *Laun v. Union Elec. Co. of Mo.*, 166 S.W.2d 1065, 1069 (Mo. 1942); *Sacco v. High Country Indep. Press, Inc.*, 896 P.2d 411, 430 (Mont. 1995); *Kocontes v. McQuaid*, 778 N.W.2d 410, 416 (Neb. 2010); *State v. Second Judicial Dist. Court ex rel. Cnty. of Washoe*, 55 P.3d 420, 424 (Nev. 2002); *Provencher v. Buzzell-Plourde Assocs.*, 711 A.2d 251, 255 (N.H. 1998); *Hawkins v. Harris*, 661 A.2d 284, 288 (N.J. 1995); *Superior Constr., Inc. v. Linnerooth*, 712 P.2d 1378, 1381 (N.M. 1986); *Andrews v. Gardiner*, 121 N.E. 341, 343 (N.Y. 1918); *Scott v. Statesville Plywood & Veneer Co.*, 81 S.E.2d 146, 148-49 (N.C. 1954); *Lauder v. Jones*, 101 N.W. 907, 917 (N.D. 1904); *Willitzer v. McCloud*, 453 N.E.2d 693, 695 (Ohio 1983); *Berman v. Lab. Corp. of Am.*, 268 P.3d 68, 71 (Okla. 2011); *DeLong v. Yu Enters., Inc.*, 47 P.3d 8, 10 (Or. 2002); *Bochetto v. Gibson*, 860 A.2d 67, 71 (Pa. 2004); *Ims v. Town of Portsmouth*, 32 A.3d 914, 928 (R.I. 2011); *Jenkins v. S. Ry. Co.*, 125 S.E. 912, 917 (S.C. 1924); *Harris v. Riggenbach*, 633 N.W.2d 193, 194-95 (S.D. 2001); *Logan's*, 343 S.W.2d at 894; *Reagan v. Guardian Life Ins. Co.*, 166 S.W.2d 909, 912 (Tex. 1942); *Krouse v. Bower*, 20 P.3d 895, 898 (Utah 2001); *Letourneau v. Hickey*, 807 A.2d 437, 441 (Vt. 2002); *Donohoe Constr. Co. v. Mount Vernon Assocs.*, 369 S.E.2d 857, 860 (Va. 1988); *Wynn v. Earin*, 181 P.3d 806, 810 (Wash. 2008); *Clark v. Druckman*, 624 S.E.2d 864, 869-70 (W. Va. 2005); *Bussewitz v. Wis. Teachers' Ass'n*, 205 N.W. 808, 810 (Wis. 1925); *Abromats v. Wood*, 213 P.3d 966, 970 (Wyo. 2009).

342; *Rehberg*, 132 S. Ct. at 1505-06. This Court held that the immunity analysis does not rest "on the status of the defendant" because "[a] police officer on the witness stand performs the same functions as any other witness." *Briscoe*, 460 U.S. at 342. In other words, because *all* witnesses contribute to the judiciary's fact-finding mission, all citizens must be encouraged to take on that responsibility, and protected when they do so.

B. The First Amendment Offers No Less Protection Than the Common Law

In assessing the First Amendment rights of public employees, the Court should not disregard the long and unbroken common-law tradition. The Court has often found that the First Amendment *expands* the protections available at common law, because the goal of the Bill of Rights was to "secur[e] for the people of the United States much greater freedom of religion, expression, assembly, and petition than the people of Great Britain had ever enjoyed." *Bridges v. California*, 314 U.S. 252, 265 (1941); *see also, e.g.*, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 348-50 (1974); *Grosjean v. Am. Press Co.*, 297 U.S. 233, 249 (1936). But so far as we are aware, this Court has never done the opposite and held that speech that was *protected* at common law falls outside the ambit of the First Amendment.

Instead, this Court has long interpreted the First Amendment to reflect and enshrine historical and common-law protections related to speech. For example, this Court has held that "the right to attend criminal trials is implicit in the guarantees of the First Amendment" because "the freedom to attend such trials" is one "which people have exercised for centuries" and was "part of the common-law

tradition." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 574, 580 (1980) (plurality opinion) (footnote omitted). Similarly, the Court grounded the First Amendment right of access to preliminary hearings on the common-law and historical tradition granting such access. *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 10 (1986).

This Court has reiterated the point twice in the last four years alone. In *United States v. Stevens*, 559 U.S. 460 (2010), and *United States v. Alvarez*, 132 S. Ct. 2537 (2012), the Court held that a category of speech enjoys full First Amendment protection absent a historical tradition permitting restriction of that category. First, in *Stevens*, the Court held that depictions of animal cruelty were protected by the First Amendment because there was no "tradition excluding" such depictions. 559 U.S. at 469. In so doing the Court expressly rejected the Government's argument that "categories of speech may be exempted from the First Amendment's protection without any long-settled tradition of subjecting that speech to regulation." *Id.*

Two years later, in *Alvarez*, the Court declined to find any general exception to the First Amendment for untruthful speech. Justice Kennedy's opinion for the Court explained that "content-based restrictions on speech have been permitted, as a general matter, only when confined to the few 'historic and traditional categories [of expression] long familiar to the bar.'" *Alvarez*, 132 S. Ct. at 2544 (alteration in original) (quoting *Stevens*, 559 U.S. at 468); *accord Nev. Comm'n on Ethics v. Carrigan*, 131 S. Ct. 2343, 2349 (2011) (holding that legislative recusal rules do not violate legislators' First Amendment rights because such rules have a "long-standing . . . common-law"

pedigree); *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 127 (1991) (Kennedy, J., concurring in the judgment) (observing that "the use of . . . traditional legal categories" to determine whether speech is without First Amendment protection "is preferable to . . . ad hoc balancing").

This Court has already recognized that public employee speech must get at least as much protection under the First Amendment as was available at common law. For that proposition we need look no further than the public-concern test itself. Under the common law, individuals are protected from liability for invading another person's privacy if the claim rests on speech that is "of legitimate concern to the public." Restatement (Second) of Torts § 652D. This Court then adopted that standard in *Connick v. Myers*, noting the source, to determine the circumstances in which a public employee's speech is protected. 461 U.S. at 143 n.5; *see also City of San Diego, Cal. v. Roe*, 543 U.S. 77, 83 (2004).

In short, the longstanding and consistent tradition under the common law is to give absolute protection to any sworn statement by any individual in connection with a judicial proceeding, precisely because such statements always implicate a matter of public concern. The First Amendment requires no less.

III. The Government Will Rarely Have a Legitimate Interest in Discharging its Employees for Truthful Testimony

Under this Court's familiar balancing test, a determination that a public employee has spoken as a citizen on a matter of public concern does not end the matter. The government may still discharge the

employee, but only if it can demonstrate a competing, overriding interest in preventing such speech. *Connick*, 461 U.S. at 150-51; *Pickering*, 391 U.S. at 572-73. That interest must be grounded in the "effective and efficient fulfillment of [the government's] responsibilities to the public," *Connick*, 461 U.S. at 150, and the government cannot restrict speech unless doing so is "necessary" to effective and efficient operation. *Garcetti*, 547 U.S. at 419. Finally, the "more substantially" the speech "involve[s] matters of public concern," the "stronger" the government "showing" that may be required. *Connick*, 461 U.S. at 152.

The government will rarely have a legitimate interest in preventing an employee from giving truthful testimony in a judicial proceeding. "The notion that the State may silence the testimony of state employees simply because that testimony is contrary to the interests of the State in litigation or otherwise, is antithetical to the protection extended by the First Amendment." *Hoover*, 164 F.3d at 226. Rather, the government's interest is in *promoting* such testimony, which is essential to the "integrity of the judicial system and public confidence in the system." *Nixon*, 418 U.S. at 709. An employee does not "disrupt the office," "undermine [a supervisor's] authority," or "destroy [office] working relationships," *Connick*, 461 U.S. at 154, by leaving the office to testify truthfully in a proceeding supervised by a judge. Rather, the employee fulfills a "basic obligation that every citizen *owes* his Government." *Calandra*, 414 U.S. at 345 (emphasis added). Thus, with respect to sworn testimony, a government has no "adequate justification for treating the employee differently from any other member of the general public." *Garcetti*, 547 U.S. at 418.

At a minimum, the State of Alabama certainly had no interest in preventing Edward Lane from complying with a subpoena issued by the United States and providing truthful testimony about public corruption in a federal criminal trial. *See* Pet. Br. 23-25. Under the balancing test established in *Pickering* and *Connick*, the State's decision to discharge Mr. Lane violated his First Amendment rights.

CONCLUSION

The judgment of the Eleventh Circuit should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
MAR 10 2014
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No. 13-483

IN THE

Supreme Court of the United States

EDWARD LANE,

Petitioner,

v.

STEVE FRANKS, IN HIS INDIVIDUAL CAPACITY, AND SUSAN BURROW, IN HER OFFICIAL CAPACITY AS ACTING PRESIDENT OF CENTRAL ALABAMA COMMUNITY COLLEGE,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) is a federation of 56 national and international labor organizations with a total membership of approximately 12.5 million working men and women.[1] This case concerns the extent to which the First Amendment protects public employees from retaliation by their employers for their truthful testimony in judicial proceedings. Many of the employees represented by AFL-CIO affiliates are public employees. The AFL-CIO has, therefore, frequently filed *amicus curiae* briefs in cases concerning the constitutional rights of public employees. *See, e.g.*, *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488 (2011); *City of Ontario v. Quon*, 560 U.S. 746 (2010); *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

STATEMENT

In 2006, Edward Lane was hired as director of a youth training program at Central Alabama Community College. App. 2a. Soon after his hire, Lane learned that then-State Senator Suzanne Schmitz was being paid by the training program but did not per-

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[1] Counsel for the petitioners and counsel for each respondent have filed letters with the Court consenting to the filing of *amicus* briefs supporting either party. No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus*, made a monetary contribution to the preparation or submission of this brief.

form any work. *Ibid.* After Lane directed Schmitz to report to work and Schmitz refused, Lane terminated Schmitz's employment. *Ibid.* Schmitz then told another training program employee that she planned to "get [Lane] back" for firing her and that if he ever sought funds for the program from the state legislature that she would inform him that "you're fired." *Ibid.*

Lane was subpoenaed to testify before a federal grand jury that was investigating Schmitz and at two successive federal criminal trials in which Schmitz was charged with mail fraud and fraud involving a program receiving federal funds. *Id.* at 2a-3a. Lane testified about his conversations and correspondence with Schmitz related to her employment by the job training program. *Id.* at 3a.

Soon after Lane testified in Schmitz's first criminal trial, College President Steve Franks laid off Lane. *Id.* at 3a-4a. Lane filed suit against Franks in his individual and official capacities under 42 U.S.C. § 1983, alleging that he was terminated in retaliation for his testimony in violation of the First Amendment.

The district court granted summary judgment to Franks, and the court of appeals affirmed. Applying *Garcetti v. Ceballos*, 547 U.S. 410 (2006), the court of appeals determined that "Lane's speech was made pursuant to his official duties as [the training program]'s Director, not as a citizen on a matter of public concern." App. 4a.

Lane filed a petition for a writ of certiorari seeking review of the court of appeals' decision, which this Court granted.

SUMMARY OF ARGUMENT

Whether public employee speech is protected by the First Amendment turns on whether an employee speaks as a citizen about a matter of public concern or as an employee within the scope of his or her employment. In making this determination, the form and context of such speech is often as important as its content. When a public employee speaks in a public forum – such as by submitting a letter to the editor of a newspaper or making a public comment at a school board meeting – the form and context of that speech strongly indicate that the employee speaks as a citizen. This is true even if the speech's content addresses work-related matters. Individuals who work for the government remain citizens entitled to participate in public affairs. And, the public has a strong interest in hearing the views of public employees, who are often among the best-informed citizens regarding matters related to the workings of government.

The importance of form and context in determining the level of First Amendment protection to which particular speech is entitled is well-illustrated by this Court's decisions concerning the extent to which public employers may compel employees to financially support the activities of their union representative. Those cases draw a line between when the union speaks pursuant to its defined role within the public employer's labor relations apparatus – such as speech related to collective bargaining – and when the union speaks on a matter of general public concern in a public forum – such as lobbying the legislature on a matter unrelated to collective bargaining. As is the case with direct government restrictions on public employee speech, a public employer may compel its employees to financially support union

speech that occurs within the former, work-related, context, but not union speech in a public forum unrelated to the union's collective bargaining responsibilities.

In this case, it is clear from the form and context of Lane's speech – sworn testimony before a grand jury and at two criminal trials – that he spoke as a citizen, not as an employee, even though the content of his speech concerned events that occurred in the course of his employment. The duty to testify truthfully in a legal proceeding about facts within one's knowledge is a duty of citizenship, not of employment. Thus, even though Lane's statements would not have been protected by the First Amendment if made in the context of his employment, the College was not entitled to fire him for making the same statements in the course of his sworn testimony.

ARGUMENT

This Court's modern jurisprudence regarding the First Amendment rights of public employees rests on the proposition that "a citizen who works for the government is nonetheless a citizen." *Garcetti*, 547 U.S. at 419. Given that premise, the guiding principle in reviewing governmental restrictions on public employee speech is the following:

> "The First Amendment limits the ability of a public employer to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens. So long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively." *Ibid.* (citations omitted).

This application of the First Amendment takes account of "the necessity for informed, vibrant dialogue in a democratic society." *Ibid.*

At the same time, however, this Court has also recognized that "[g]overnment employers, like private employers, need a significant degree of control over their employees' words and actions[, because] without it, there would be little chance for the efficient provision of public services." *Id.* at 418. That being so, "[t]he government's interest in managing its internal affairs requires proper restraints on the invocation of rights by employees when the workplace or the government employer's responsibilities may be affected." *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2497 (2011). In recognition of the government's managerial interests, the Court has held "that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior." *Connick v. Myers*, 461 U.S. 138, 147 (1983).

Determining whether in any given instance a public employee "speaks . . . as a citizen upon [a] matter[] of public concern" or "as an employee upon [a] matter[] only of personal interest" requires a fact-dependent inquiry into "the content, form, and context of a given statement." *Id.* at 147-48. Precisely because "form and context" can be as important to the analysis as "content," *ibid.*, "[t]he forum in which [a statement is made] will be relevant to the determination of whether the [speech] relates to a matter of public concern." *Guarnieri*, 131 S. Ct. at 2501.

"The government's interest in managing its internal affairs" is at its strongest when employee speech occurs within "the workplace" or while the employee is otherwise carrying out his or her official "responsibilities." *Guarnieri*, 131 S. Ct. at 2497. It follows from the common-sense proposition that "[w]orking time is for work," *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803 n. 10 (1945), that the employer has a legitimate interest in controlling employee actions – including speech – that occur within the employment relationship. Thus, when an employee's speech is part of "conducting [a] task . . . within the scope of [his] professional duties," *Garcetti*, 547 U.S. at 425, the public employer can control that speech just as it can control other aspects of the employee's job performance. Similarly, the First Amendment does not usually protect speech occurring within "an internal grievance procedure" where, by definition, the employee does "not seek to communicate to the public." *Guarnieri*, 131 S. Ct. at 2501.

This is not to say that the "form and context" of public employee speech always prevails over "content" in the First Amendment analysis. When an employee seeks "to advance a political or social point of view beyond the employment context," *ibid.*, First Amendment protections can apply, even when the speech itself occurs solely within the workplace. *See, e.g., Connick*, 461 U.S. at 149 (inquiry concerning whether co-workers "ever feel pressured to work in political campaigns on behalf of office supported candidates" constituted speech on a matter of public concern); *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410 (1979) (teacher's private conversations with principal about racial discrimination in the school system constituted speech on a matter of public concern).

The salient point is that "[e]mployees who make public statements *outside* the course of performing their official duties" – and, by the same token, employees who make public statements outside of the workplace – "retain some possibility of First Amendment protection because that is the kind of activity engaged in by citizens who do not work for the government." *Garcetti*, 547 U.S. at 423 (emphasis added). Thus, when public employee speech takes place in "a forum for direct citizen involvement," *Madison Joint Sch. Dist. v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167, 175 (1976) – *e.g.*, "a letter to a local newspaper," *Garcetti*, 547 U.S. at 423 (citing *Pickering v. Bd. of Educ.*, 391 U.S. 563, 573 (1968)), "testi[mony] before committees of the [state] [l]egislature," *Connick*, 461 U.S. at 145 (discussing *Perry v. Sindermann*, 408 U.S. 593 (1972)), an interview with a radio station, *id.* at 146 (discussing *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977)), or during the public comment period of a school board meeting, *Madison Joint Sch. Dist.*, 429 U.S. at 174-75 – the form and context of the speech strongly indicate that the public employee is speaking as a citizen.[2]

Public employee speech in "a forum for direct citizen involvement," *id.* at 175, is generally entitled to

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[2] Of course, there are exceptions. For example, a public employee "hired to be the governor's spokesperson" – *i.e.*, to represent the governor before the public and in the media – "is paid to articulate and disseminate the governor's views, not to offer her own opinions on the topics of the day." *Chrzanowski v. Bianchi*, 725 F.3d 734, 741 (7th Cir. 2013). Statements by such a government spokesperson in a public forum will often come "within the scope of the employee's professional duties," *Garcetti*, 547 U.S. at 425, and thus be subject to the control of the public employer.

First Amendment protection, even if the *content* of the speech concerns work-related matters. "Public employees are 'the members of a community most likely to have informed and definite opinions' about a wide range of matters related, directly or indirectly, to their employment." *Guarnieri*, 131 S. Ct. at 2500 (quoting *Pickering*, 391 U.S. at 572). For this reason, "the public has a right to hear the views of public employees," and public employees have "a right to participate as [] citizen[s] . . . in the democratic process," even when that participation includes publicly speaking about workplace-related matters. *Id.* at 2500-01.

2. This Court's decisions concerning the extent to which public employers may compel their employees to financially support the activities of their union representative vividly demonstrate the importance of form and context in determining the level of First Amendment protection for public employee speech.

Public employers may compel their employees to financially support the costs "of collective bargaining, contract administration, and grievance adjustment." *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 225-26 (1977). This is so, even though "[a]n employee may very well have ideological objections to . . . the union's policy in negotiating a medical benefits plan[,] . . . a union policy of negotiating limits on the right to strike," or even "the union's wage policy." *Id.* at 222. In *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 521-22 (1991), this Court held that, while the First Amendment permits public employers to compel financial support for a union representative to bargain over employment matters, it would be unconstitutional for them to compel employee financial support for union lobbying addressed to "political activities outside the

scope of the collective-bargaining context." For example, a teachers' union that bargains over the hours of work does not interfere with the First Amendment rights of the teachers it represents, even if some teachers disagree with the union's position on that matter. But if the union lobbies for a law that mandates specific school hours – or supports a candidate who favors such a law – it would be engaged in speech in a public forum outside its role as a bargaining agent that public employees could not be compelled to financially support.

Lehnert drew a similar line between nonpublic internal union communications and external union public relations activities unrelated to collective bargaining. Thus, the Court held that employees could be compelled to financially support "those positions of the [teachers' union newsletter] that concern teaching and education generally, professional development, unemployment, job opportunities, award programs of the [union], and other miscellaneous matters," because "these [communications] are neither political nor public in nature." 500 U.S. at 529. On the other hand, *Lehnert* held employees could not be compelled to financially support "public speech in support of the teaching profession generally," because "the public relations activities at issue . . . entailed speech of a political nature in a public forum." *Id.* at 528.[3]

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[3] Of course, union lobbying and other union activities in public fora *are* chargeable to represented employees insofar as they "relate . . . to the ratification or implementation of a . . . collective-bargaining agreement." *Lehnert*, 500 U.S. at 520. *See also*

The principal reason that lobbying and general public relations activities are subject to closer First Amendment scrutiny than collective bargaining and a union's internal communications is that the former activities constitute "public discourse [in a] public for[um] open to all," *id.* at 521, while the latter occur within the framework of the labor-management relations system. This distinction between communications in a public forum as a citizen and communications made within the labor relations context as a bargaining agent of employees is similar to that drawn in the cases addressed to direct government restrictions on speech by public employees.

3. The important dichotomy between speech within the public employment context and speech outside that context is determinative here.

If the College had punished Lane for statements he made about Schmitz in an official report or in some other similar communication made within the employment setting, the court below would be correct that Lane's First Amendment claim would fail under *Garcetti*. But the statements were not made within the employment setting, and that difference is crucial for determining whether Lane was speaking as a citizen on a matter of public concern.

It is clear from the fora in which Lane spoke – before a grand jury and in two criminal trials – that Lane

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Locke v. Karass, 555 U.S. 207, 210 (2009) (union may charge for "litigation . . . related to collective bargaining rather than political activities"). By the same token, public employers may restrict public employee speech in a public forum where the employer advances sufficient managerial reasons for doing so.

was *not* speaking as an employee, but rather as a citizen, even though his testimony concerned events that occurred during the course of his employment.

The court of appeals reasoned that the fact "[t]hat Lane testified about his official activities pursuant to a subpoena and in the litigation context, in and of itself, does not bring Lane's speech within the protection of the First Amendment," App. 7a, stating that it found especially "pertinent that the subject matter of Lane's testimony touched only on acts he performed as part of his official duties." *Ibid.* On this basis, the court concluded that "the record fails to establish that Lane testified as a citizen on a matter of public concern," such that Lane failed as a matter of law to state a claim under the First Amendment. *Id.* at 8a.

Lane was not "conducting [a] task . . . within the scope of [his] professional duties," *Garcetti*, 547 U.S. at 425, however, when he provided truthful sworn testimony before the grand jury and as a fact witness at Schmitz's criminal trials. Lane was employed as the director of a job training program at a community college, not as a prosecutor or other law enforcement official who might in the ordinary course of his employment be required to appear or testify before a grand or petit jury. And, although Lane's testimony concerned events that occurred during his employment, the basis of Lane's lawsuit is *not* that Franks retaliated against him because of speech that took place at the workplace; nor does Franks claim that he fired Lane for that reason.

By giving his testimony, Lane fulfilled the "general obligation of a citizen to appear before a grand jury or at trial, pursuant to a subpoena, and give what infor-

mation he possesses," *Branzburg v. Hayes*, 408 U.S. 665, 686 (1972), rather than any duty related to his employment. *See also United States v. Calandra*, 414 U.S. 338, 345 (1974) ("The duty to testify has long been recognized as a basic obligation that every citizen owes his Government."). Indeed, Lane had little choice; failure to obey a federal grand jury subpoena is punishable by contempt. Fed. R. Crim. P. 17(g). And, because "'the public . . . has a right to every man's evidence,'" *Branzburg*, 408 U.S. at 688 (quoting *United States v. Bryan*, 339 U.S. 323, 331 (1950)), "[i]t would be strange to have a constitutional rule that . . . allows the State to condition public employment on an employee's willingness to impede the judicial process by remaining mute," *Chrzanowski*, 725 F.3d at 741-42, or, worse yet, by testifying falsely.

To be clear, Lane's conversations with and about Schmitz that took place *at work* and *within the scope* of his duties to "r[u]n the [job training program], including day-to-day operations, hiring and firing of employees, and making financial decisions," App. 10a, were not protected by the First Amendment, even though that speech concerned the same facts about which Lane ultimately testified before the grand jury and at Schmitz's criminal trials. But the forum in which speech takes place matters; Franks was not entitled to fire Lane for undertaking the "basic obligation that every citizen owes his Government," *Calandra*, 414 U.S. at 345, of truthfully testifying in a legal proceeding as to facts within his knowledge, even if those facts related to actions that occurred in the course of Lane's employment.

CONCLUSION

The Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 13-483

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

EDWARD LANE,

Petitioner,

—v.—

STEVE FRANKS, IN HIS INDIVIDUAL CAPACITY, AND SUSAN BURROW, IN HER OFFICIAL CAPACITY AS ACTING PRESIDENT OF CENTRAL ALABAMA COMMUNITY COLLEGE,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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INTEREST OF *AMICUS CURIAE*[1]

Amicus First Amendment Coalition ("FAC") is a section 501(c)(3) nonprofit organization dedicated to First Amendment freedoms—primarily freedom of speech and the press—and government transparency. Founded in 1988, FAC works to enhance and protect these rights through a free legal consultation service, educational and information services, public advocacy of various kinds, and litigation, including the initiation of litigation in its own name and the filing of briefs *amicus curiae*. FAC receives support from foundations and from its members, who include individuals and corporations.

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission. Consents are on file by all parties for the filing of amicus briefs in this matter.

INTRODUCTION AND SUMMARY OF ARGUMENT

A disposition memorandum written by a deputy district attorney recommending the dismissal of a case led to his firing and ultimately to this Court's ruling in *Garcetti* v. *Ceballos*, 547 U.S. 410 (2006). This case involves neither a rejected recommendation nor any disagreement about public policy between government officials, but truthful testimony by a government employee in a judicial proceeding that led to the conviction of a public official who had violated the public trust by engaging in criminal conduct. The *Garcetti* decision may not be read so expansively as to permit the dismissal of a public employee simply because he told the truth, under oath, in court. That cannot be squared with principles established and repeated throughout the history of the First Amendment: that truthful speech is at the apex of the constitutional safeguard; that truthful speech about matters of public concern and the conduct of public officials is especially protected; and that truthful testimony in court, in particular, may not serve as the basis for public sanction. Our brief is devoted to a discussion of these core principles, their evolution, and their application.

ARGUMENT

I. THE UNITED STATES HAS LONG RECOGNIZED THAT EXPANSIVE PROTECTION OF TRUTHFUL SPEECH IS ESSENTIAL TO A FREE AND DEMOCRATIC SOCIETY

So firmly and repeatedly has it been stated that a central basis for protecting freedom of expression – perhaps *the* central basis – is its essential role in determining truth that it is difficult to choose amongst quotations to offer for that proposition. From Jefferson ("truth is great and will prevail if left to herself") to Holmes ("the theory of our Constitution" is that freedom of speech is both "the best test of truth" and "truth is the only ground upon which [men's] wishes safely can be carried out"), the need to protect freedom of speech, and the truth that can be revealed by it, has been paramount in First Amendment jurisprudence. An Act for Establishing Religious Freedom (enacted 1785), 12 Hening, Statutes of Virginia (1823), at 84, 85; *Abrams* v. *United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). This Court has long since concluded that "[t]ruth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned." *Garrison* v. *Louisiana*, 379 U.S. 64, 74 (1964).

Protection of truthful speech is deeply rooted in American history. In pre-revolutionary days, the Zenger trial offered a stark example of the value placed by the colonists on the freedom to speak truthfully. Charged with seditious libel for publishing articles critical of the Royal Governor of New York, Zenger was tried at a time when truth

was not a defense to criminal libel. Notwithstanding that law, Zenger's counsel, Andrew Hamilton, appealed to the jury to consider the defense of truth, stating:

> It is the Cause of Liberty; and I make no Doubt but your upright Conduct, this Day, will not only entitle you to the Love and Esteem of your Fellow-Citizens; but every Man, who prefers Freedom to a Life of Slavery, will bless and honour You, as Men who have baffled the Attempt of Tyranny; and by an impartial and uncorrupt Verdict, have laid a noble Foundation for securing to ourselves, our Posterity, and our Neighbors, That, to which Nature and the Laws of our Country have given us a Right, – The Liberty – both of exposing and opposing arbitrary Power (in these Parts of the World, at least) by speaking and writing Truth.

J. Alexander, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER 29 (1738). Although the royal judge instructed the jurors that they should not consider truth as a defense, the jury nonetheless acquitted.

The jury's decision to acquit Zenger is neither legal precedent nor an authoritative statement of the law, but "in the popular tradition of free speech and press, Zenger's case set a very important precedent indeed. It stood for the proposition that truthful statements on matters of public concern were protected speech." Michael Kent Curtis, FREE SPEECH, "THE PEOPLE'S DARLING PRIVILEGE" 42 (2000). Hamilton's plea that the freedom to speak the truth will deter tyranny and despotism

permeated the discussion in the years leading up to the adoption of the Bill of Rights. The account of the trial went through fourteen editions before 1791, and popular support for the outcome is evidenced by the references to Zenger in the discussions preceding the adoption of the First Amendment. *See* Zechariah Chafee, Jr., FREE SPEECH IN THE UNITED STATES 21 (1941).

Not long after the adoption of the Bill of Rights, Congress passed the Sedition Act of 1798, probably the most direct and dangerous challenge to free expression in the nation's history. But even that law allowed for the defense of truth, providing that it was a crime, punishable by a $5,000 fine and five years in prison, "if any person shall write, print, utter or publish . . . any *false*, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress . . . , or the President . . . , with intent to defame . . . or to bring them, or either of them, into contempt or disrepute; or to excite against them, or either or any of them, the hatred of the good people of the United States." 1 Stat. 596 (1798) (emphasis added).

Perhaps the best demonstration of the constitutional premium placed on truthful speech is the length this Court has gone to protect even *false* speech in the service of protecting speech that is true. That, after all, is the basis for the actual malice test established in *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964). After first bolstering true speech by placing the burden of proving falsity on a public official in a libel case, the *Sullivan* Court took the crucial step of protecting even false speech made without knowledge of falsity or reck-

less disregard of truth or falsity. *Id.* at 279-80. Noting the chilling effect on truthful speech by a contrary rule, the Court explained that "[a]llowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred." *Id.* at 279. The Court further observed that "[e]ven a false statement may be deemed to make a valuable contribution to public debate, since it brings about 'the clearer perception and livelier impression of truth, produced by its collision with error.'" *Id.* at 279 n.19 (quoting J. Mill, ON LIBERTY 15 (Blackwell ed. 1947)).

Ten years later, the Court began to extend these protections to private figure cases. In *Gertz* v. *Robert Welch, Inc.*, the Court held that in cases involving matters of public interest, states could not impose liability without fault, and presumed or punitive damages could not be imposed without demonstrating actual malice. 418 U.S. 323 (1974). Recognizing that the actual malice standard protected some false speech, the Court explained that "[t]he First Amendment requires that we protect some falsehood in order to protect speech that matters." *Id.* at 341.

Most recently, the Court required private figure plaintiffs to prove the falsity of their statements when suing over a matter of public concern. *See Philadelphia Newspapers, Inc.* v. *Hepps*, 475 U.S. 767, 776 (1986). In *Hepps*, the Court stated "that the common law's rule on falsity—that the defendant must bear the burden of proving truth—must similarly fall here to a constitutional requirement that the plaintiff bear the burden of showing falsity[.]" *Id.* at 776. *Hepps* also made clear that the Court's underlying motivation was

the protection of truth, expressing its belief "that the Constitution requires us to tip [the scales] in favor of protecting true speech . . . [t]o ensure that true speech on matters of public concern is not deterred." *Id.* at 776-77.

That the First Amendment can even protect lies in the service of preventing the chilling of truthful speech is powerfully demonstrated in *United States* v. *Alvarez*, 132 S. Ct. 2537 (2012). In that particularly difficult case addressing the constitutionality of the Stolen Valor Act, which prohibited falsely claiming to have earned military decoration, the Court was deeply divided, but not on the proposition that false speech is sometimes protected for the greater good of protecting truthful speech. *Id.* at 2548. Justice Kennedy's plurality opinion concluded that even though the statute "targets falsity and nothing more," it still threatens truthful speech by "cast[ing] a chill, a chill the First Amendment cannot permit." *Id.* at 2548-49. Justice Breyer's concurring opinion, referring back to *Gertz*, observed that "as the Court has often said, the threat of criminal prosecution for making a false statement can inhibit the speaker from making true statements, thereby 'chilling' a kind of speech that lies at the First Amendment's heart." *Id.* at 2553. And Justice Alito's dissenting opinion, while concluding that the Act in question was constitutional, observed that "there are broad areas in which any attempt by the state to penalize purportedly false speech would present a grave and unacceptable danger of suppressing truthful speech." *Id.* at 2564.

The overriding importance of protecting truthful speech is also reflected in this Court's opinions

outside the libel area. Initially, commercial speech did not fall within the ambit of the First Amendment. *Valentine* v. *Chrestensen*, 316 U.S. 52 (1942). Commencing with *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, the Court ruled that limitations on truthful commercial speech also required First Amendment scrutiny. 425 U.S. 748 (1976). Framing the issue as "whether a State may completely suppress the dissemination of concededly truthful information about entirely lawful activity," the Court had little difficulty answering in the negative. *Id.* at 773; *see also Linmark Assocs.* v. *Township of Willingboro*, 431 U.S. 85, 95 (1977) (holding that, despite the important governmental objective of maintaining racially integrated communities, "the First Amendment disabled the State from achieving its goal by restricting the free flow of truthful information").

This was followed by *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, in which the Court articulated what would become the seminal test for the constitutionality of restrictions on commercial speech. 447 U.S. 557 (1980). Recognizing the importance of protecting truthful speech in the commercial realm, the four-part test laid out in *Central Hudson* first requires determining whether the speech at issue is true and accurate. *Id.* at 566. "If the communication is [not] misleading . . . the government's power is more circumscribed" and "[t]he State must assert a substantial interest to be achieved by restrictions on commercial speech." *Id.* at 564. Since *Central Hudson*, this Court has gradually expanded the commercial speech doctrine, largely fueled by the importance of disseminating truthful information to consumers. *See Sorrell* v. *IMS*

Health Inc., 131 S. Ct. 2653, 2670-71 (2011) ("But 'the fear that people would make bad decisions if given truthful information' cannot justify content-based burdens on speech."); *Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525, 562 (2001) (holding that the ban on tobacco advertisements "constitute nearly a complete ban on the communication of truthful information about smokeless tobacco and cigars to adult consumers."); *44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484, 501 (1996) ("[W]hen a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands.").

The law of privacy offers yet another example of this Court's consistent protection of truthful speech, especially in matters involving areas of public concern. In *Cox Broadcasting Corp.* v. *Cohn*, the Court held that an organization that accurately reported a rape victim's name from official records could not be liable for, *inter alia*, invasion of privacy. 420 U.S. 469, 491-96 (1975). Acknowledging that "the interests on both sides are plainly rooted in the traditions and significant concerns of our society," the Court stated that while "political institutions must weigh the interests in privacy with the interests of the public to know" the truth, at "the very least, the First and Fourteenth Amendments will not allow exposing the press to liability for truthfully publishing information released to the public in official court records." *Id.* at 491, 496. Addressing similar circumstances in *Florida Star* v. *B.J.F.*, the Court cited the "overarching 'public interest, secured by

the Constitution, in the dissemination of truth,'" stating that "punishing truthful publication in the name of privacy" would be an "extraordinary measure[.]" 491 U.S. 524, 533, 540 (1989). The Court held that "where a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order." *Id.* at 541.

The Court ruled similarly when weighing the interests at stake in the publication of the names of juvenile defendants. *See Smith* v. *Daily Mail Publishing Co.*, 443 U.S. 97, 102 (1979) ("[S]tate action to punish the publication of truthful information seldom can satisfy constitutional standards."); *Oklahoma Publishing Co.* v. *District Court*, 430 U.S. 308, 311 (1977) (striking down an injunction prohibiting the publication of the name or a photograph of a boy being tried before a juvenile court because, once the truthful information was "publicly revealed" or "in the public domain," the court could not constitutionally restrain its dissemination).

This outcome has not varied even when the truthful information had initially been obtained illegally. In *Bartnicki* v. *Vopper*, the defendant broadcasted a conversation that was recorded, by a non-party, in violation of a federal wiretapping statute. 532 U.S. 514, 518-19 (2001). Despite acknowledging that "[p]rivacy of communication is an important interest," the Court held that "enforcement of [the relevant law] . . . implicate[d] the core purposes of the First Amendment because it impose[d] sanctions on the publication of truthful information of public concern," and, for that reason,

the non-party's "illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern." *Id.* at 532-35.[2]

Even an asserted "privilege against disclosure of confidential communications" involving the President of the United States has been held insufficient to hamper the search for truthful information. *United States* v. *Nixon*, 418 U.S. 683, 710 (1974). In *Nixon*, the Court refused to quash a non-party subpoena issued to the President, stating "[t]he need to develop all relevant facts in the adversary system is both fundamental and comprehensive" and the "exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth." *Id.* at 709, 710.

II. THE VALUE OF TRUTHFUL SPEECH IS AT ITS HEIGHT IN JUDICIAL PROCEEDINGS

Certain legal principles are so widely known outside the legal community that every citizen can

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[2] Because of the import of the truth defense, privacy claims are difficult to sustain. *See, e.g., Lake* v. *Wal-Mart Stores, Inc.*, 582 N.W.2d 231, 236 (Minn. 1998) ("[B]ecause of the overlap with defamation and the other privacy torts, a case has rarely succeeded squarely on a false light claim . . . . We are also concerned that false light inhibits free speech guarantees provided by the First Amendment."); *Cain* v. *Hearst Corp.*, 878 S.W.2d 577, 579-81 (Tex. 1994) ("[The Texas Supreme Court] reject[s] the false light invasion of privacy tort" because, *inter alia*, "it lacks many of the procedural limitations that accompany actions for defamation, thus unacceptably increasing the tension that already exists between free speech constitutional guarantees and tort law."). *See generally* Harry Kalven Jr., *Privacy in Tort Law—Were Warren and Brandeis Wrong?* 31 LAW & CONTEMP. PROBS., 326 (1966).

recite them from memory. *See Dickerson* v. *United States*, 530 U.S. 428, 443 (2000) (upholding *Miranda* v. *Arizona*, 384 U.S. 436 (1966), because, *inter alia*, "the warnings have become part of our national culture"). First among them is the duty to testify to "the truth, the whole truth and nothing but the truth." *See United States* v. *Calandra*, 414 U.S. 338, 345 (1974) ("The duty to testify has long been recognized as a basic obligation that every citizen owes his Government."); *Piemonte* v. *United States*, 367 U.S. 556, 559 n.2 (1961) ("Every citizen . . . owes to his society the duty of giving testimony to aid in the enforcement of law."); *Blair* v. *United States*, 250 U.S. 273, 282 (1919) (in context of grand jury proceeding, holding that "the witness is bound not only to attend but to tell what he knows in answer to questions framed for the purpose of bringing out the truth of the matter under inquiry.").

It is for this reason that "[p]erjured testimony 'is at war with justice,'" as "it can cause a court to render a 'judgment not resting on truth.'" *Alvarez*, 132 S. Ct. at 2546; *see also United States* v. *Dunnigan*, 507 U.S. 87, 97 (1993) ("To uphold the integrity of our trial system . . . the constitutionality of perjury statutes is unquestioned."). "Unlike speech in other contexts, testimony under oath has the formality and gravity necessary to remind the witness that his or her statements will be the basis for official governmental action, action that often affects the rights and liberties of others." *Alvarez*, 132 S. Ct. at 2546. Therefore, "[t]here is no gainsaying that arriving at the truth is a fundamental goal of our legal system." *United States* v. *Havens*, 446 U.S. 620, 626 (1980); *see also United States* v. *Mezzanatto*, 513 U.S. 196, 204

(1995) (citing with approval the adoption of court rules that "*enhance[]* the truth-seeking function of trials" and "result in more accurate verdicts") (emphasis in original); *Nix* v. *Whiteside*, 475 U.S. 157, 166 (1986). The truth seeking policy is particularly important in criminal trials. *See Jenkins* v. *Anderson*, 447 U.S. 231, 238 (1980); *Havens*, 446 U.S. at 626.[3]

To encourage the duty to testify truthfully, it is well established public policy that in-court testimony receives special protection against civil claims. At common law and today, parties and witnesses have been immune from subsequent damages suits for their testimony in judicial proceedings. *Briscoe* v. *LaHue*, 460 U.S. 325, 330-33 (1983). The courts protect this privilege because "the claims of the individual must yield to the dictates of public policy, which requires that the paths which lead to the ascertainment of truth should be left as free and unobstructed as possible." *Id.* at 332-33 (quoting *Calkins* v. *Sumner*, 13 Wis. 193, 197 (1860)).

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[3] Under the Civil Rights Act, Congress has provided, and this Court has consistently upheld, a private cause of action for witnesses against those who seek to intimidate or threaten "any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified." 42 U.S.C. § 1985(2); *Haddle* v. *Garrison*, 525 U.S. 121, 126 (1998) (an at-will employee may file a claim under 42 U.S.C. § 1985(2) for damages against a third party who conspires with his employer to fire him to deter him from testifying at an upcoming criminal trial); *Kush* v. *Rutledge*, 460 U.S. 719, 726-27 (1983) (permitting claims under § 1985(2) against state university officials for conduct related to student's lawsuit against the university).

This Court held in *Briscoe* that this immunity extends equally to testimony by public officials and private citizens. *Id.* at 335-36 & 355 n.15. More recently, this Court extended the reasoning of *Briscoe* to grand jury witnesses – again to protect truthful testimony and to discourage false testimony. *Rehberg* v. *Paulk*, 132 S. Ct. 1497, 1505 (2012) ("Without absolute immunity for witnesses . . . the truth-seeking process at trial would be impaired. 'Witnesses might be reluctant to come forward to testify,' and even if a witness took the stand, the witness 'might be inclined to shade his testimony in favor of the potential plaintiff' for fear of subsequent liability."). *Cf. Butterworth* v. *Smith*, 494 U.S. 624, 635 (1990) (recognizing the importance of a witness' "ability to make a truthful public statement" outside of court notwithstanding the longstanding recognition of a societal interest in grand jury secrecy).

By a parity of reasoning, a public employee's obligation to testify truthfully should be accompanied by the right to do so free from retaliation. If a public employee's truthful testimony were not protected by the First Amendment, the employee would be faced with an intolerable Hobson's choice if called to testify. *See Caruso* v. *City of New York*, __ F. Supp. 2d __, No. 06 Civ. 5997, 2013 WL 5382206, at *15 (S.D.N.Y. Sept. 26, 2013) (Abrams, J.) ("He or she 'could either (1) honestly answer the question, in which case, as a matter of law, she could be fired; (2) commit perjury; or (3) refuse to answer the question posed and be held in contempt.'").

Nothing in *Garcetti* requires government employees to be put to such a choice. Nothing in the First Amendment permits it.

CONCLUSION

The judgment of the Eleventh Circuit should be reversed.

Dated: March 10, 2014

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AMICUS CURIAE BRIEF

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BRIEFS

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In the Supreme Court of the United States

EDWARD LANE,

Petitioner,

v.

STEVE FRANKS, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR GOVERNMENT ACCOUNTABILITY PROJECT AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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CASES

Bell Atl. Corp. v. *Twombly*,
550 U.S 544 (2007) 22

Bishop v. *Fed. Intermediate Credit Bank of Wichita*, 908 F.2d 658 (10th Cir. 1990) 13

Briscoe v. *LaHue*,
460 U.S. 325 (1983) 5, 21

Calkins v. *Sumner*,
13 Wis. 193 (1860) 5, 21

Carr v. *City of Camden*,
2012 WL 4051884 (D.N.J. 2012) 23

Chrzanowski v. *Bianchi*,
2012 WL 2680800 (N.D. Ill. 2012) 23

Chrzanowski v. *Bianchi*,
725 F.3d 734 (7th Cir. 2013) 15, 19, 24

Clairmont v. *Sound Mental Health*,
632 F.3d 1091 (9th Cir. 2011) 15, 22

Connick v. *Myers*,
461 U.S. 138 (1983) 4, 22

Davis v. *City of E. Orange*,
No. 05-3720, 2008 WL 4328218 (D.N.J. Sept. 17, 2008) 23

Evans v. *Hous. Auth. of City of Benicia*,
No. 2:07-CV-0391, 2008 WL 4177729 (E.D. Cal. Sept. 8, 2008) 23

Fairley v. *Andrews*,
578 F.3d 518 (7th Cir. 2009) 14, 15, 23, 24

TABLE OF AUTHORITIES—continued

Page(s)

Fitzgerald v. *Salsbury Chem., Inc.*,
613 N.W.2d 275 (Iowa 2000) 13

Foster v. *Thompson*,
No. 05-CV-305-TCK-FHM, 2008 WL
4682264 (N.D. Okla. Oct. 21, 2008) 23

Frisenda v. *Inc. Vill. of Malverne*,
775 F. Supp. 2d 486 (E.D.N.Y. 2011) 23

Gantt v. *Sentry Ins.*,
824 P.2d 680 (Cal. 1992) 13

Garcetti v. *Ceballos*,
547 U.S. 410 (2006) ..... *passim*

Green v. *Barrett*,
226 F. App'x 883 (11th Cir. 2007) 15, 23

Hayburn v. *City of Phila.*,
2012 WL 3238344 (E.D. Pa. 2012) 23

Hook v. *Regents of Univ. of Cal.*,
576 F. Supp. 2d 1223 (D.N.M. 2008) 23

Huppert v. *City of Pittsburg*,
574 F.3d 696 (9th Cir. 2009) 22

Jackler v. *Byrne*,
658 F.3d 225 (2d Cir. 2011) 15

Johnson v. *LaPeer Cnty.*,
No. 04-74659, 2006 WL 2925292 (E.D.
Mich. Oct. 11, 2006) 23

Karl v. *City of Mountlake Terrace*,
678 F.3d 1062 (9th Cir. 2012) 14

TABLE OF AUTHORITIES—continued

Page(s)

Karl v. *City of Mountlake Terrace*,
678 F.3d 1062 (9th Cir. 2012) 14, 22

Kerstetter v. *Pa. Dep't of Corrs. SCI- Coal Twp.*, No. 4:08-CV-1984, 2010 WL 936457
(M.D. Pa. Mar. 12, 2010) 23

Lane v. *Cent. Ala. Cmty. Coll.*,
CV-11-BE-0883, 2012 WL 5873351
(N.D. Ala. Nov. 20, 2012) 17

Lawson v. *FMR LLC*,
No. 12-3, 2014 WL 813701
(U.S. Mar. 4, 2014) 13, 16

Ludwick v. *This Minute of Carolina, Inc.*,
337 S.E.2d 213 (S.C. 1985) 13

Matrisciano v. *Randle*,
569 F.3d 723 (7th Cir. 2009) 15, 23

Matthews v. *Lynch*,
No. 3:07-cv-739 (WWE), 2011 WL 1363783
(D. Conn. Apr. 11, 2011) 23

Minten v. *Weber*,
832 F. Supp. 2d 1007 (N.D. Iowa 2011) 23

Moore v. *Money*,
No. 2:11-CV-122, 2011 WL 5966957
(S.D. Ohio Nov. 29, 2011) 23

Morales v. Jones,
494 F.3d 590 (7th Cir. 2007) 23

Mullins v. *City of New York*,
634 F. Supp. 2d 373 (S.D.N.Y. 2009) 23

TABLE OF AUTHORITIES—continued

Page(s)

Nixon v. *Fitzgerald*,
457 U.S. 731 (1982) 8

Novak v. *Bd. of Educ. of Fayetteville-Manlius Cent. Sch. Dist.*, No. 505-CV-199, 2007 WL 804679 (N.D.N.Y. Mar. 14, 2007) 23

Page v. *Columbia Natural Res., Inc.*,
480 S.E.2d 817 (W.Va. 1996) 13

Pickering v. *Board of Ed.*,
391 U.S. 563 (1968) 5, 21, 24

Piemonte v. *United States*,
367 U.S. 556 (1961) 19

Polycast Tech. Corp. v. *Uniroyal, Inc.*,
87 Civ. 3297 (CSH), 1992 WL 123185 (S.D.N.Y. May 28, 1992) 14

Proper v. *Sch. Bd. of Calhoun Cnty. Fla.*,
No. 5:10-cv-287-RS-EMT, 2011 WL 3608678 (N.D. Fla. Aug. 12, 2011) 23

Ramirez v. *Cnty. of Marin*,
No. C 10-02899, 2011 WL 5080145 (N.D. Cal. Oct. 25, 2011) 23

Rehberg v. *Paulk*,
132 S. Ct. 1497 (2012) 21

Reid v. *City of Atlanta*,
No. 1:08-cv-01846-JOF, 2010 WL 1138456 (N.D. Ga. Mar. 22, 2010) 23

Reilly v. *City of Atl. City*,
532 F.3d 216 (3d Cir. 2008) 15, 20, 23

TABLE OF AUTHORITIES—continued

Page(s)

Ressler v. *Humane Soc. of Grand Forks*,
480 N.W.2d 429 (N.D. 1992) 13

Serianni v. *City of Venice, Fla.*,
No. 8:10-cv-2249-T-33TBM, 2011 WL
2533692 (M.D. Fla. June 27, 2011) 23

United States v. *Calandra*,
414 U.S. 338 (1974) 4, 19

United States v. *Havens*,
446 U.S. 620 (1980) 21

United States v. *Nixon*,
418 U.S. 683 (1974) 19

Vaticano v. *Twp. of Edison*,
No. 09-01751 (SDW)(MCA), 2010 WL
4628296 (D.N.J. Nov. 5, 2010) 23

Whitfield v. *Chartiers Valley Sch. Dist.*,
707 F. Supp. 2d 561 (W.D. Pa. 2010) 23

Willard v. *Golden Gallon-TN, LLC*,
154 S.W.3d 571 (Tenn. Ct. App. 2004) 13

Williams v. *Hillhaven Corp.*,
370 S.E.2d 423 (N.C. Ct. App. 1988) 13

Wiskotoni v. *Mich. Nat. Bank-West*,
716 F.2d 378 (6th Cir. 1983) 13

STATUTES, RULES AND REGULATIONS

5 U.S.C. § 2302(a)(2)(C)(ii)(I) 17

5 U.S.C. § 2302(a)(2)(C)(ii)(II) 17

42 U.S.C. § 1983 ..... 2, 14

TABLE OF AUTHORITIES—continued

Page(s)

S.D. Codified Laws § 3-6D-22 (2014) 17

Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A 2

Wash. Rev. Code § 42.40.020(2) (2014) 17

Whistleblower Protection Act (WPA) of 1989, Pub. L. No. 101-12, 103 Stat. 16 2

Whistleblower Protection Enhancement Act (WPEA), Pub. L. No 112-199, 126 Stat. 1465 (2012) 2

MISCELLANEOUS

A Look Back at the William J. Jefferson Corruption Case, Fed. Bureau of Investigation (Apr. 9, 2013), http://perma.cc/BG3J-SYHW 11

Bruce Alpert, *William Jefferson's Activities Cast as "Official Acts" by Witnesses in Corruption Trial*, Times-Picayune (New Orleans), June 26, 2009, http://perma.cc/9S3A-PSK8 11

Pamela H. Bucy, *Information as a Commodity in the Regulatory World*, 39 Hous. L. Rev. 905 (2002) 9

Indira Carr & David Lewis, *Combating Corruption Through Employment Law and Whistleblower Protection*, 39 Indus. L.J. 52, 56 (2010) 9

Corruption Trial Continues for DeWeese, Greene County Messenger, Feb. 3, 2012 12

TABLE OF AUTHORITIES—continued

Page(s)

Bruce D. Fisher, *The Whistleblower Protection Act of 1989: A False Hope for Whistleblowers*, 43 Rutgers L. Rev. 355 (1991) 13

Jeff Gottlieb, *Sergeant Who Reported Bell Corruption Wins Whistle-Blower Settlement*, L.A. Times, Aug. 4, 2012, http://perma.cc/H6VY-W8HY 10

Eric B. Kempen & Andrew P. Bakaj, *Marshalling Whistleblower Protection*, J. Pub. Inquiry, Spring/Summer 2009 8

Corey Kilgannon, *Serpico on Serpico*, N.Y. Times, Jan. 22, 2010, http://perma.cc/UF8T-QZ45 10

Brendan Kirby, *Jury Convicts Bayou La Batre Mayor Stan Wright of Four Federal Crimes*, Alabama Media (Mar. 1, 2013, 5:22 PM), http://perma.cc/JL7E-NYAU 14

Doug Gross, *Former Georgia School Chief Accused of Stealing $600,000*, San Diego Union-Tribune, May 1, 2006, http://perma.cc/VCG2-AD48 11

Glaeser & Raven E. Saks, *Corruption in America*, 90 J. Pub. Econ. 1053 (2006) 15

Rajeev K. Goel & Michael A. Nelson, *Effectiveness of Whistleblower Laws in Combating Corruption* 14 (Bank of Finland Inst. for Economies in Transition, 2013), http://perma.cc/34L3-LESN 16

TABLE OF AUTHORITIES—continued

Page(s)

Myron Peretz Glazer & Penina Migdal Glazer, *The Whistleblowers: Exposing Corruption in Government and Industry* 250-251 (1989) 15

Roberta Ann Johnson, *Whistleblowing: When It Works—and Why* (2003) 8

IRS Agent: Kilpatrick Lived Beyond His Means, Detroit News, Jan. 25, 2013 12

Lance Griffin, *Judge Lewis Testifies at Bingo Corruption Trial*, Dothan Eagle (Dothan, Ala.), June 22, 2011 12

Miriam Hernandez, *Bell Corruption Trial: Angela Spaccia Testifies on High Salaries*, KABC-TV Los Angeles (Nov. 8, 2013), http://perma.cc/QGD8-2FMV 10

Jenna Pizzi, *Fate of Trenton Mayor Tony Mack Will Soon Be in the Hands of the Jury*, Times (Trenton, N.J.), Feb. 2, 2014, http://perma.cc/Q3HU-5A82 11

Justice, Pub. Integrity Section, *Report to Congress on the Activities and Operations of the Public Integrity Section for 2012* 9

KABC-TV Los Angeles (Nov. 8, 2013), http://perma.cc/QGD8-2FMV 10

Know Your Rights When Reporting Wrongs, Office of Special Counsel, http://perma.cc/3KUE-CBZW 9

TABLE OF AUTHORITIES—continued

Page(s)

Juliet Linderman, *In Ray Nagin Trial, 31 Witnesses in 6 Days of Testimony*, Times-Picayune (New Orleans), Feb. 8, 2014, http://perma.cc/MVY8-RQLL 10

Nat'l Whistleblowers Ctr., http://perma.cc/B35Y-JQUF 17

Orly Lobel, *Citizenship, Organizational Citizenship, and the Laws of Overlapping Obligations*, 97 Cal. L. Rev. 433 (2009) 16

Oversight Hearing on Counterterrorism: Hearing Before the S. Comm. on the Judiciary, 107th Cong. 17 (2002) 7

Pub. Emps. for Envtl. Responsibility, *State Whistleblower Laws—Overview*, http://perma.cc/N8LW-URG2 17

Quality of Health Care: Human Experimentation: Hearings Before the Subcomm. on Health of the H. Comm. on Labor & Pub. Welfare, 93d Cong. 3:1223-28 (1973) 8

Susan M. Reverby, *Examining Tuskegee: The Infamous Syphilis Study and Its Legacy* (2009) 7

Amanda Ripley & Maggie Sieger, *The Special Agent*, Time, Dec. 22, 2002, http://perma.cc/8XMV-UFK8 11

TABLE OF AUTHORITIES—continued

Page(s)

Jamie Sasser, Comment, *Silenced Citizens: The Post-*Garcetti *Landscape for Public Sector Employees Working in National Security*, 41 U. Rich. L. Rev. 759 (2007) 18

Steve Schultze, *Key Witness Testifies: County Official Says Thomas' Use of Vague Language Was Meant to Disguise a Bribe*, Milwaukee J. Sentinel, Aug. 23, 2012 12

Bill Silverfarb, *7-Eleven: Is It Legal?*, San Mateo Daily J., Jan. 14, 2013 12

R. Jeffrey Smith, *Justice IG Supports FBI Whistle-Blower*, Wash. Post, July 30, 2004 7

S. Rep. No. 112-155 (2012) 6

State Whistleblower Laws, Nat'l Conf. of State Legislatures (Nov. 2010), http://perma.cc/AQL2-X37D 17

State Whistleblower Statutes, Nat'l Whistleblowers Ctr., http://perma.cc/B35Y-JQUF 17

Threats Feared in LPD Dispute, Daily Advertiser (Lafayette, La.), May 25, 2012 12

U.S. Dep't of Justice, Pub. Integrity Section, *Report to Congress on the Activities and Operations of the Public Integrity Section for 2012* (2013), http://perma.cc/BP9V-2LA2 9

U.S. Merit Sys. Prot. Bd., *Blowing the Whistle: Barriers to Federal Employees Making Disclosures* 10-11 (2011), http://tinyurl.com/nnj7pwr; 13, 15

TABLE OF AUTHORITIES—continued

Page(s)

Bob Warren, *Mandeville Selects Stiebing Successor*, Times-Picayune (New Orleans), Sept. 29, 2011 12

BRIEF FOR GOVERNMENT ACCOUNTABILITY PROJECT AS *AMICUS CURIUM* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIUM*

The Government Accountability Project (GAP) is a nonprofit, nonpartisan public interest organization specializing in legal advocacy on behalf of whistleblowers. GAP addresses all forms of whistleblowing, but most of its work relates to whistleblowing efforts that expose betrayals of the public trust.[1]

GAP defines a "whistleblower" as an employee, agent, or consultant who discloses information that he or she reasonably believes is evidence of illegality, gross waste or fraud, mismanagement, abuse of power, general wrongdoing, or a substantial and specific danger to public health and safety. Although whistleblowers often provide information to journalists, government officials, or others who can influence and rectify the wrongdoing, they also frequently testify under oath before courts or legislative bodies.

GAP's extensive experience—assisting more than 5,000 whistleblowers since 1979—has allowed it to assess the frequency of retaliation against truthful whistleblowers and the means used to retaliate. These include professional demotions, pretextual terminations (as occurred in this case), loss of duties, or-

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

ders to submit to psychological testing, isolation, retaliatory investigations, and criminal prosecutions.

GAP's attorneys have testified regularly before Congress on the effectiveness (and ineffectiveness) of existing statutory protections, filed numerous *amicus curiae* briefs on constitutional and statutory issues relevant to whistleblowers, coauthored the model whistleblower protection laws to implement the Inter-American Convention Against Corruption, and led legislative campaigns for a broad range of relevant federal laws, including the Whistleblower Protection Act (WPA) of 1989, Pub. L. No. 101-12, 103 Stat. 16; the subsequent 1994 amendments to that Act; and the Whistleblower Protection Enhancement Act (WPEA), Pub. L. No 112-199, 126 Stat. 1465 (2012). GAP also has led legislative campaigns to enact the whistleblower provisions in the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A, and the numerous corporate whistleblower statutes enacted in the wake of that law.

Based on its extensive experience in this area, GAP believes strongly that the absence of a remedy under 42 U.S.C. § 1983 for government whistleblowers who suffer retaliation for testifying truthfully will subject these individuals to the Hobson's choice of testifying truthfully and suffering retaliation—including loss of their jobs; or attempting to avoid testifying (and risking contempt sanctions); or shading their testimony to please their supervisors and thereby avoid retaliation. That will make government employees much less willing to come forward and offer to testify regarding wrongdoing.

The First Amendment does not require that result. To the contrary, the First Amendment's protections for government employees, as construed in

Garcetti v. *Ceballos*, 547 U.S. 410 (2006), encompass truthful testimony under oath. Testifying truthfully is a duty of all citizens, not an obligation tied to government employment. And eligibility for First Amendment protection will make government employees more willing to reveal wrongdoing—preserving a critical source of information for detecting and punishing those who misuse government power.

SUMMARY OF ARGUMENT

Truthful sworn testimony by government employees plays a critical role in uncovering official misconduct and holding wrongdoers accountable. Because whistleblowing employees are "insiders," they are uniquely situated to identify malfeasance and gather comprehensive evidence. Thus, testimony by government employees has proven to be essential in a variety of contexts, particularly cases of government corruption.

These whistleblowers frequently face threats of retaliation from supervisors seeking to conceal their own wrongdoing or the crimes of others. Employees who testify about official wrongdoing often encounter demotion, suspension, and even dismissal.

The inevitable result is that many who see something say nothing. Studies confirm the intuition that misconduct often goes unreported because witnesses are afraid of the consequences of telling the truth. Robust protections for whistleblowers are essential to ameliorating this problem.

Unfortunately, existing state whistleblower-protection laws are a patchwork. A significant number of States have not adopted a general whistleblower protection law. Other statutes contain exclu-

sions—like Alabama's here—for particular categories of employees or do not include sworn testimony within the class of protected conduct.

The First Amendment can and does fill that gap.

Sworn testimony by a government employee plainly qualifies as speech by a citizen on a matter of public concern, and therefore is eligible for First Amendment protection under this Court's decision in *Garcetti* v. *Ceballos*, 547 U.S. 410 (2006).

"The duty to testify has long been recognized as a basic obligation that every citizen owes his Government." *United States* v. *Calandra*, 414 U.S. 338, 345 (1974). Sworn testimony therefore just as plainly constitutes speech by the government employee as a citizen, not in his or her official capacity.

And the fact that a government tribunal is receiving sworn testimony on a topic, and will exercise its authority in rendering a decision, necessarily means that the testimony relates to a matter of public concern. *Garcetti*'s threshold standard is satisfied.

Finally, there is no basis for distinguishing sworn testimony presented pursuant to subpoena from sworn testimony resulting from a government employee's voluntary appearance. In both situations, the testimony constitutes speech by the employee as a citizen on a matter of public concern.

Recognizing that reality poses little risk of "constitutionaliz[ing] the employee grievance," *Connick* v. *Myers*, 461 U.S. 138, 154 (1983), or "commit[ting] state and federal courts to a new, permanent, and intrusive role" in adjudicating employment disputes, *Garcetti*, 547 U.S. at 423. Holding sworn testimony eligible for First Amendment protection will affect

the important, but limited category of cases in which the government employee actually provided sworn testimony. The presence, or absence, of that essential, and objective, factual context will be easy to determine at the pleading stage.

Moreover, a determination that truthful sworn testimony is *eligible* for First Amendment protection does not mean that the employee will prevail in every case—even if he or she is able to establish retaliation. The employer would still have the opportunity to show that the retaliatory actions were justified under the *Pickering* balancing test.

Finally, while government employers are entitled to "sufficient discretion to manage their operations" and therefore "have heightened interests in controlling speech made by an employee in his or her professional capacity," *Garcetti*, 547 U.S. at 422, they have no legitimate interest in depriving a government tribunal of relevant evidence by preventing government employees from providing truthful sworn testimony.

Eligibility for First Amendment protection will merely provide much-needed protections against interference with the ability of government tribunals to obtain all relevant truthful evidence, ensuring "that the paths which lead to the ascertainment of truth * * * be left as free and unobstructed as possible." *Briscoe* v. *LaHue*, 460 U.S. 325, 333 (1983) (quoting *Calkins* v. *Sumner*, 13 Wis. 193, 197 (1860)).

ARGUMENT

I. Protecting Public Employees Against Retaliation For Truthful Sworn Testimony Is Essential To Uncovering Government Wrongdoing.

Government employees are the most important source of information about government wrongdoing. But these employees fear—justifiably—that they will suffer retaliation from their superiors if they testify regarding improprieties. Comprehensive protection against retaliation is therefore critical to uncovering and prosecuting these breaches of the public trust. But state laws fall far short of providing the protection necessary to assure employees that they will be protected—as this case illustrates.

A. Public Employees' Testimony Frequently Addresses Matters Of Great Public Importance.

There is a "strong national interest in protecting good faith whistleblowing." S. Rep. No. 112-155, at 6 (2012). Public employees who provide truthful testimony to public bodies often reveal significant "governmental inefficiency and misconduct." *Garcetti* v. *Ceballos*, 547 U.S. 410, 425 (2006).

For example, shortly after the attacks of September 11, 2001, FBI agent Coleen Rowley provided Congress with a detailed account of the FBI's failures prior to 9/11, contributing to a major reorganization of the intelligence community. Amanda Ripley & Maggie Sieger, *The Special Agent*, Time, Dec. 22, 2002, http://perma.cc/8XMV-UFK8. Among those failures, she disclosed that her superiors had failed to "take seriously the case of Zacarias Moussaoui,"

the would-be twentieth hijacker involved in the terrorist attacks. *Ibid.*

Following her testimony before Congress, Rowley was "stung by a nasty backlash within the FBI," including a suggestion that she might be subject to potential criminal charges. Ripley & Sieger, *supra*. See also R. Jeffrey Smith, *Justice IG Supports FBI Whistle-Blower*, Wash. Post, July 30, 2004, at A17 (discussing Rowley and noting that, in a contemporaneous retaliation suit against the FBI, DOJ's inspector general concluded that whistleblowing was "at least a contributing factor" in the firing of the individual, who was "at least the third FBI whistle-blower to accuse the bureau of retaliation or interference since 2001").

Members of Congress expressed concern over potential retaliation. See, *e.g.*, *Oversight Hearing on Counterterrorism: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. 17 (2002) (statement of Sen. Leahy, Chairman, S. Comm. on the Judiciary) (asking FBI Director Mueller, "Can you personally assure this Committee, unequivocally, there will be no retaliation of any kind against [Coleen Rowley]?").

Another federal employee, Peter Buxtun, who served as an epidemiologist with the Public Health Service, discovered the Tuskegee syphilis experiments—in which the government deceived hundreds of African-American men into believing that they were receiving treatment for syphilis, when in fact the researchers were intentionally letting the syphilis develop untreated in order to study the effects of the disease. Susan M. Reverby, *Examining Tuskegee: The Infamous Syphilis Study and Its Legacy* 73-85 (2009).

Buxtun's superiors told him that if he continued to investigate the experiments, he would likely be fired. *Quality of Health Care: Human Experimentation: Hearings Before the Subcomm. on Health of the H. Comm. on Labor & Pub. Welfare*, 93d Cong. 3:1223-28 (1973) (statement of Peter Buxtun). He nevertheless testified about his findings before Congress, *ibid.*, which put a stop to the experiments.

A. Ernest Fitzgerald—a federal employee at the Department of Defense—exposed massive cost-overruns of nearly $2 billion in the development of the C-5A cargo plane. *Nixon* v. *Fitzgerald*, 457 U.S. 731, 734 (1982). Despite significant pressure from his superiors to keep silent, he agreed to testify in Senate hearings on the subject. Roberta Ann Johnson, *Whistleblowing: When It Works—and Why* 92-93 (2003). Following Fitzgerald's testimony, President Nixon told his aides to "get rid of" him. Eric B. Kempen & Andrew P. Bakaj, *Marshalling Whistleblower Protection*, J. Pub. Inquiry, Spring/Summer 2009, at 6.

Fitzgerald faced numerous retaliatory actions by his employers, including the loss of many of his duties, which were replaced by trivial projects. Eventually he was fired. It took years of litigation for Fitzgerald to regain his prior position with the Department of Defense. Johnson, *supra*, at 93.

These examples of high-profile federal employee whistleblowers are not at all unique. Whistleblowers' testimony frequently provides critical information regarding government malfeasance at the state and local level.

Bribes and other forms of public corruption pose a significant threat to government at all levels. In-

deed, the Department of Justice has obtained over 20,000 convictions for crimes involving public corruption in just the last two decades. U.S. Dep't of Justice, Pub. Integrity Section, *Report to Congress on the Activities and Operations of the Public Integrity Section for 2012*, at 26 (2013), http://perma.cc/BP9V-2L42.

Testimony of public employees is crucial to uncovering and prosecuting these offenses. "[C]orruption is a hidden activity," which makes investigation "extremely difficult." Indira Carr & David Lewis, *Combating Corruption Through Employment Law and Whistleblower Protection*, 39 Indus. L.J. 52, 56 (2010). As the federal Office of Special Counsel has recognized, whistleblowing by government employees "play[s] a critical role in keeping our government honest, efficient and accountable." *Know Your Rights When Reporting Wrongs*, Office of Special Counsel, http://perma.cc/3KUE-CBZW.

Employees can spot instances of corruption long before outside investigators; expose gaps, inaccuracies, and falsehoods in an organization's cover story; and point investigators to relevant documents and other evidence. See generally Pamela H. Bucy, *Information as a Commodity in the Regulatory World*, 39 Hous. L. Rev. 905, 940-948 (2002) (discussing the importance of insider information in uncovering wrongdoing). Without public employees who are willing to come forward and testify, many of these cases would never be brought at all and those that could be brought would be far harder to prosecute.

A paradigmatic example is provided by police officer Frank Serpico, who exposed widespread corruption within the New York City Police Department in the late 1960s. Serpico reported evidence of police of-

ficers taking bribes from criminals amounting to millions of dollars, but saw his reports ignored or concealed.

Serpico subsequently testified before the Knapp Commission, which was created to investigate his reports, as well as in individual trials involving instances of corruption. See Corey Kilgannon, *Serpico on Serpico*, N.Y. Times, Jan. 22, 2010, http://perma.cc/UF8T-QZ45.

There are many similar examples of public employees providing critical testimony in anti-corruption cases:

- The testimony of Kim Raney, a local police chief, was crucial to demonstrating that a Bell, California official had knowingly authorized inflated salaries for high-level employees. Miriam Hernandez, *Bell Corruption Trial: Angela Spaccia Testifies on High Salaries*, KABC-TV Los Angeles (Nov. 8, 2013), http://perma.cc/QGD8-2FMV. Another police officer, who reported the corruption in the first place, was forced into retirement in retaliation for his actions. Jeff Gottlieb, *Sergeant Who Reported Bell Corruption Wins Whistle-Blower Settlement*, L.A. Times, Aug. 4, 2012, http://perma.cc/H6VY-W8HY.
- Several public employees provided critical testimony in the trial of former New Orleans Mayor Ray Nagin on bribery charges. Juliet Linderman, *In Ray Nagin Trial, 31 Witnesses in 6 Days of Testimony*, Times-Picayune (New Orleans), Feb. 8, 2014, http://perma.cc/MVY8-RQLL. These employees were uniquely positioned to testify regarding Nagin's ex-

ercise of his official powers in exchange for monetary payoffs.

- In yet another case, public employees testified regarding former Congressman William Jefferson's exchange of "official acts" for bribes. Bruce Alpert, *William Jefferson's Activities Cast as "Official Acts" by Witnesses in Corruption Trial*, Times-Picayune (New Orleans), June 26, 2009, http://perma.cc/9S3A-PSK8. His trial featured the testimony of a dozen government officials that prosecutors claimed he attempted to influence. *Rooting Out Corruption: A Look Back at the Jefferson Case*, Fed. Bureau of Investigation (Apr. 9, 2013), http://perma.cc/BG3J-SYHW.

- The prosecution of Linda Schrenko, a Georgia state official who siphoned federal educational funds to pay for a political campaign, demonstrates how public employees are best-situated to illustrate the mechanics of corrupt schemes. Grant Rowe, a director of accounting, was able to testify regarding the means used to launder the stolen funds through a series of companies owned by a third party. Doug Gross, *Former Georgia School Chief Accused of Stealing $600,000*, San Diego Union-Tribune, May 1, 2006, http://perma.cc/VCG2-AD48.

Without public employees' testimony, these cases and many others would be difficult if not impossible to prosecute.[2] Indeed, the case before the Court con-

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[2] For other examples of how public employee testimony can expose corruption, see Jenna Pizzi, *Fate of Trenton Mayor Tony Mack Will Soon Be in the Hands of the Jury*, Times

firms the point: petitioner's testimony regarding a public official who received a paycheck for doing nothing stemmed from information gained in an audit that petitioner personally conducted. Pet. App. 2a.

B. Protections Against Retaliation Are Critical To Obtaining Truthful Testimony From Government Employees.

Government officials frequently seek to conceal wrongdoing by using threats of retaliation to coerce employees into refusing to testify or even committing perjury. Testifying employees can be fired, suspended, demoted, stripped of benefits, denied a necessary security clearance, or subjected to negative personnel reports.

Moreover, retaliation need not be obvious. A supervisor can disguise his or her true aims by seeking to reorganize a department; claiming that technolog-

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(Trenton, N.J.), Feb. 2, 2014, http://perma.cc/Q3HU-5A82 (bribery); *IRS Agent: Kilpatrick Lived Beyond His Means*, Detroit News, Jan. 25, 2013, at A5 (bribery and kickbacks); Bill Silverfarb, *7-Eleven: Is It Legal?*, San Mateo Daily J., Jan. 14, 2013 (abuse of city building permit process); Steve Schultze, *Key Witness Testifies: County Official Says Thomas' Use of Vague Language Was Meant to Disguise a Bribe*, Milwaukee J. Sentinel, Aug. 23, 2012, at 1 (solicitation of bribes); *Threats Feared in LPD Dispute*, Daily Advertiser (Lafayette, La.), May 25, 2012 (police department corruption); *Corruption Trial Continues for DeWeese*, Greene County Messenger, Feb. 3, 2012 (using political staff for campaign work); *The Prosecution's Case*, Plain Dealer (Cleveland), Feb. 17, 2012, at A1 (racketeering); Bob Warren, *Mandeville Selects Stiebing Successor*, Times-Picayune (New Orleans), Sept. 29, 2011, at B (abuse of city credit cards); Lance Griffin, *Judge Lewis Testifies at Bingo Corruption Trial*, Dothan Eagle (Dothan, Ala.), June 22, 2011 (vote-buying).

ical advances have made the whistleblower's job outdated; or creating a hostile work environment that forces the employee to resign. See Bruce D. Fisher, *The Whistleblower Protection Act of 1989: A False Hope for Whistleblowers*, 43 Rutgers L. Rev. 355, 363-369 (1991).

The reality of retaliation is well-known to government employees. A 2010 survey by the Merit Systems Protection Board found that over one-third of employees who reported misconduct faced reprisal or threat of reprisal by their employer. U.S. Merit Sys. Prot. Bd., *Blowing the Whistle: Barriers to Federal Employees Making Disclosures* 10-11 (2011), http://tinyurl.com/nnj7pwr; see also *Lawson* v. *FMR LLC*, No. 12-3, 2014 WL 813701, at *4 (U.S. Mar. 4, 2014) (discussing the "corporate code of silence" and retaliation that discouraged employees of Enron and its contractors from coming forward with evidence of fraud).

The particular situation presented here—retaliation for truthful testimony—is not rare. To the contrary, it occurs all too frequently.[3]

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[3] Following are just a few examples of cases in which a private-sector employee alleged that he or she had suffered retaliation for providing or intending to provide truthful sworn testimony regarding his or her employer: *Bishop* v. *Fed. Intermediate Credit Bank of Wichita*, 908 F.2d 658 (10th Cir. 1990); *Wiskotoni* v. *Mich. Nat'l Bank-West*, 716 F.2d 378 (6th Cir. 1983); *Fitzgerald* v. *Salsbury Chem., Inc.*, 613 N.W.2d 275 (Iowa 2000); *Page* v. *Columbia Natural Res., Inc.*, 480 S.E.2d 817 (W.Va. 1996); *Gantt* v. *Sentry Ins.*, 824 P.2d 680 (Cal. 1992); *Ressler* v. *Humane Soc. of Grand Forks*, 480 N.W.2d 429, 433 (N.D. 1992); *Ludwick* v. *This Minute of Carolina, Inc.*, 337 S.E.2d 213 (S.C. 1985); *Willard* v. *Golden Gallon-TN, LLC*, 154 S.W.3d 571 (Tenn. Ct. App. 2004); *Wil-*

There are numerous examples of retaliation against government employees who testify truthfully. The mayor of Bayou La Batre, Alabama was recently convicted on charges of corruption and witness tampering. He attempted to ruin the career of a police investigator who cooperated with the FBI by reporting an illicit land deal involving the mayor and the mayor's daughter. Brendan Kirby, *Jury Convicts Bayou La Batre Mayor Stan Wright of Four Federal Crimes*, Alabama Media (Mar. 1, 2013, 5:22 PM), http://perma.cc/JL7E-NYAU. The mayor's trial itself featured the testimony of numerous current and former city police officers, which was critical to proving that he had engaged in retaliation. *Ibid.*

Threats of retaliation by government supervisors are a feature of numerous cases in the lower courts. In *Karl* v. *City of Mountlake Terrace*, 678 F.3d 1062 (9th Cir. 2012), the plaintiff was allegedly fired for testifying in a deposition pursuant to a subpoena in a Section 1983 case. After she testified, one of the defendants "was overheard commenting that Karl's testimony 'really hurt' the City, that she could not be trusted anymore, and that the Police Department would have to find a way to 'get rid of her.'" *Id.* at 1066.

In *Fairley* v. *Andrews*, 578 F.3d 518 (7th Cir. 2009), the plaintiffs, prison guards, were subjected to death threats after stating that they would be willing to testify in a suit alleging brutal treatment of prisoners by other guards. One defendant said "[i]f [plaintiff] goes into court on this [case] . . . and tells the truth, he will f[**]k everyone involved. . . . We

liams v. *Hillhaven Corp.*, 370 S.E.2d 423 (N.C. Ct. App. 1988); and *Polycast Tech. Corp.* v. *Uniroyal, Inc.*, 87 Civ. 3297 (CSH), 1992 WL 123185 (S.D.N.Y. May 28, 1992).

always knew he was a weak link and when a weak link can f[**]k everyone in the chain, then we have to bury the weak link." *Id.* at 521.[4]

Employees know that they may be subject to significant adverse consequences if they make the courageous decision to provide their testimony. They are left with a difficult choice: (1) testify, and potentially lose their job; (2) refuse to testify, and risk contempt of court; or (3) testify falsely, and face criminal sanctions for perjury.

Protection against retaliation mitigates these fears and encourages employees to come forward. The Merit Systems Protection Board study found that nearly two-thirds of the 40,000 surveyed employees indicated that protections from reprisal would be an "important" consideration in deciding whether to report corruption or other government misconduct. U.S. Merit Sys. Prot. Bd., *supra*, at 16-17; see also Myron Peretz Glazer & Penina Migdal Glazer, *The Whistleblowers: Exposing Corruption in Government and Industry* 250-251 (1989) (discussing examples of whistleblowers and arguing that protection against reprisal is key to encouraging whistleblowers to come forward).

Several other studies confirm that the willingness of employees to come forward is correlated with legal protection against retaliation. See Edward L. Glaeser & Raven E. Saks, *Corruption in America*, 90

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[4] For other examples, see *Chrzanowski* v. *Bianchi*, 725 F.3d 734 (7th Cir. 2013); *Clairmont* v. *Sound Mental Health*, 632 F.3d 1091 (9th Cir. 2011); *Jackler* v. *Byrne*, 658 F.3d 225 (2d Cir. 2011); *Matrisciano* v. *Randle*, 569 F.3d 723 (7th Cir. 2009); *Reilly* v. *City of Atl. City*, 532 F.3d 216 (3d Cir. 2008); *Green* v. *Barrett*, 226 F. App'x 883, 884 (11th Cir. 2007).

J. Pub. Econ. 1053, 1065 (2006) (finding a correlation between the strength of public integrity laws, including whistleblower protections, and levels of corruption); Rajeev K. Goel & Michael A. Nelson, *Effectiveness of Whistleblower Laws in Combating Corruption* 14 (Bank of Finland Inst. for Economies in Transition, 2013), http://perma.cc/34L3-LESN (finding a correlation between public awareness of whistleblower protections and detection of corruption). The availability of legal protection against retaliation is thus a significant factor in whether employees decide to blow the whistle.[5]

C. Existing Statutes Do Not Protect Whistleblowers Against Retaliation For Truthful Sworn Testimony.

Statutes prohibiting retaliation against government employees do not provide comprehensive protection against retaliation for truthful sworn testimony. Cf. *Lawson* v. *FMR LLC*, 2014 WL 813701, at *4 (explaining that Enron was able to engage in retaliation against employee whistleblowers based on a gap in then-existing law).

On the state level, protections vary widely with respect to the categories of government employees

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[5] Addressing the risk of retaliation is particularly important because of the other factors that may deter a whistleblower from coming forward. After speaking out, employees are frequently subjected to ostracism and may have trouble maintaining their professional reputation. Whistleblowers frequently also suffer from a range of physical and psychological maladies stemming from their decision to come forward and the resulting retaliation. Orly Lobel, *Citizenship, Organizational Citizenship, and the Laws of Overlapping Obligations*, 97 Cal. L. Rev. 433, 486-487 (2009).

covered, the employee activity that can constitute protected "whistleblowing," and other requirements. Pub. Emps. for Envtl. Responsibility, *State Whistleblower Laws—Overview*, http://perma.cc/N8LW-URG2. As a result, many state employees are left without any protection. See *Garcetti*, 547 U.S. at 441 (Souter, J., dissenting) ("[I]ndividuals doing the same sorts of governmental jobs and saying the same sorts of things addressed to civic concerns will get different protection depending on the local, state, or federal jurisdictions that happened to employ them.").

Here, for example, the court below concluded that Alabama's statute did not apply because of the express exemption of state university employees and because testimony in federal court was not a protected activity. *Lane* v. *Cent. Ala. Cmty. Coll.*, CV-11-BE-0883, 2012 WL 5873351, at *2 (N.D. Ala. Nov. 20, 2012). Other state laws have similar exclusions. *E.g.*, S.D. Codified Laws § 3-6D-22 (2014) (protecting reporting only "through the chain of command of the employee's department or to the attorney general's office"); Wash. Rev. Code § 42.40.020(2) (2014) (covering state but not municipal employees).[6]

Indeed, recent studies have found that a significant number of States have no general whistleblower statute at all. See *State Whistleblower Laws*, Nat'l Conf. of State Legislatures (Nov. 2010), http://perma.cc/AQL2-X37D; see also *State Whistleblower Statutes*, Nat'l Whistleblowers Ctr., http://perma.cc/B35Y-JQUF (identifying States with only "piecemeal" whistleblower protections).

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[6] These state laws mirror the federal statute, which also contains exemptions. See 5 U.S.C. § 2302(a)(2)(C)(ii)(I) & (II).

Even when statutory protections apply, the statutory remedy may be subject to procedural standards that render it inadequate. Thus, "[f]rom 1999 to 2005, only two out of thirty whistleblower claims prevailed before the [federal] Merit Systems Protection Board * * *." See Jamie Sasser, Comment, *Silenced Citizens: The Post*-Garcetti *Landscape for Public Sector Employees Working in National Security*, 41 U. Rich. L. Rev. 759, 790 (2007).

In sum, to the extent statutory protections for whistleblowers exist at the state and local level—and in many places they do not—they frequently will not provide protection against the type of government employee whistleblowing at issue here: truthful sworn testimony.

II. Public Employees' Sworn Testimony Satisfies The *Garcetti* Standard.

"When an employee speaks as a citizen addressing a matter of public concern, the First Amendment requires a delicate balancing of the competing interests surrounding the speech and its consequences." *Garcetti*, 547 U.S. at 423. If, on the other hand, the employee is engages in the speech as part of his official duties or speaks on a matter of private concern, there is no First Amendment protection. *Ibid.* Truthful sworn testimony—whether the government employees appears as a result of a subpoena or testifies voluntarily—plainly qualifies as speech as a citizen on a matter of public concern.

First, this Court has long characterized giving truthful sworn testimony as an obligation one bears *as a citizen*. See, *e.g.*, *United States* v. *Calandra*, 414 U.S. 338, 345 (1974) ("The duty to testify has long been recognized as a basic obligation that every citi-

zen owes his Government"); *Piemonte* v. *United States*, 367 U.S. 556, 559 n.2 (1961) ("Every citizen of course owes to his society the duty of giving testimony to aid in the enforcement of the law."); see also *United States* v. *Nixon*, 418 U.S. 683, 709 (1974) (the "very integrity of the judicial system and public confidence in the [judicial] system" depends on truthful testimony and the production of evidence).

"When a public employee gives testimony pursuant to a subpoena, fulfilling the 'general obligation of [every] citizen to appear before a grand jury or at trial,' he speaks 'as a citizen' for First Amendment purposes." *Chrzanowski* v. *Bianchi*, 725 F.3d 734, 741 (7th Cir. 2013). Here, for example, petitioner testified in the criminal proceedings as a citizen and did not purport to be speaking for his employer. Pet. App. 2a-3a.

Second, truthful testimony in a judicial or legislative proceeding, by definition, involves a matter of public concern. The fact that a government proceeding has been convened to take testimony regarding the matter—and that the tribunal's decision will involve the exercise of government power—demonstrates that the proper resolution is a matter of public concern. Testimony under oath plainly qualifies as a category of expression in which the "interests at stake extend beyond the individual speaker" to encompass broader "societal interests." *Garcetti*, 547 U.S. at 419-420.

Nothing in this analysis differs if the government employee testifies voluntarily, as opposed to appearing pursuant to a subpoena. In both situations the employee is fulfilling his or her duty as a citizen to provide relevant evidence to a government tribunal. And in both situations the fact that the government

tribunal is taking testimony on a matter, and ultimately will render a determination, means that the testimony necessarily relates to a matter of public concern. Indeed, it would be a peculiar rule that held voluntary testimony ineligible for First Amendment protection and thereby created a significant incentive *against* voluntary testimony by government employees relevant to matters being heard by government tribunals.

Respondent suggests (Opp. 4) that sworn testimony in any way relating to the employee's official duties is per se excluded from First Amendment protection. But this Court in *Garcetti* rejected that approach, recognizing that "[t]he First Amendment protects some expressions related to the speaker's job." 547 U.S. at 421.[7] Whether "an employee's official responsibilities provided the initial impetus to appear in court is immaterial to his/her independent obligation as a citizen to testify truthfully." *Reilly* v. *City of Atlantic City*, 532 F. 3d 216, 231 (3d Cir. 2008).

Finally, eligibility for First Amendment protection is particularly appropriate with respect to sworn testimony because, as this Court has long recognized, "'the dictates of public policy * * * require[] that the paths which lead to the ascertainment of truth should be left as free and unobstructed as possible.'" *Briscoe* v. *LaHue*, 460 U.S. 325, 333 (1983) (quoting *Calkins* v. *Sumner*, 13 Wis. 193, 197 (1860)); see also *United States* v. *Havens*, 446 U.S. 620, 626 (1980)

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[7] The employee speech at issue in *Garcetti* was far removed from the sworn testimony context—a "work product" memorandum prepared as part of the employee's duties as a prosecutor. 547 U.S. at 422.

("There is no gainsaying that arriving at the truth is a fundamental goal of our legal system.").

The Court recently invoked this principle in unanimously holding that complaining witnesses are absolutely immune from suit for their testimony before grand juries. *Rehberg* v. *Paulk*, 132 S. Ct. 1497 (2012). It observed that "[w]itnesses might be reluctant to come forward to testify, and even if a witness took the stand, the witness might be inclined to shade his testimony * * * for fear of subsequent liability." *Id.* at 1505 (quotation marks omitted).

Similar dangers of self-censorship and distortion attend the prospect of discipline by a government employer. As this Court has explained, "the threat of dismissal from public employment," like the threat of "damage awards," is "a potent means of inhibiting speech." *Pickering* v. *Board of Ed.*, 391 U.S. 563, 574 (1968). And government employees' testimony can be especially valuable, carrying significant costs to the truth-seeking process if it is "repressed" by the threat of retaliation by a government employer seeking to prevent truthful testimony. *Garcetti*, 547 U.S. at 419-420.

III. Holding That Truthful Testimony Satisfies The *Garcetti* Standard Will Not "Constitutionalize The Employee Grievance."

Determining that public employees' truthful sworn testimony is eligible for First Amendment protection would affect an important—but also limited and easily identifiable—category of cases. It therefore presents no danger of "'constitutionaliz[ing] the employee grievance.'" *Garcetti*, 547 U.S. at 420 (quoting *Connick* v. *Myers*, 461 U.S. 138, 154 (1983)).

An employee seeking to assert a claim would have to allege facts establishing that he or she actually testified under oath and that plausibly demonstrate that the retaliatory action was related to that testimony. See *Bell Atl. Corp.* v. *Twombly*, 550 U.S 544, 557 (2007) (requiring allegations at the pleading stage to "plausibly suggest[]" the viability of a claim).

Whether the employee testified under oath is a readily-verifiable objective fact. If not alleged in the complaint, dismissal would rapidly follow. If the complaint falsely alleged that the plaintiff gave sworn testimony, a defendant could quickly move for summary judgment supported by an affidavit.

Similarly, the employee would have to allege facts supporting a connection between the testimony and the retaliatory action. Again, complaints that failed to satisfy the *Twombly* standard would be subject to dismissal.

As a result, holding that truthful testimony is eligible for First Amendment protection would not "commit state and federal courts to a new, permanent, and intrusive role" in monitoring employers. *Garcetti*, 547 U.S. at 423. Indeed, we have identified just thirty reported decisions in the six years following *Garcetti* addressing the issue of retaliation for sworn testimony.[8]

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[8] See, *e.g.*, *Karl* v. *City of Mountlake Terrace*, 678 F.3d 1062 (9th Cir. 2012); *Clairmont* v. *Sound Mental Health*, 632 F.3d 1091 (9th Cir. 2011); *Huppert* v. *City of Pittsburg*, 574 F.3d 696 (9th Cir. 2009), *overruled by Dahlia* v. *Rodriguez*, 735 F.3d 1060 (9th Cir. 2013); *Fairley* v. *Andrews*, 578 F.3d 518, 524 (7th Cir. 2009); *Matrisciano* v. *Randle*, 569 F.3d 723 (7th Cir. 2009); *Reilly* v. *City of Atl. City*, 532 F.3d 216 (3d Cir. 2008); *Morales* v. *Jones*, 494 F.3d 590 (7th Cir. 2007); *Green* v. *Barrett*, 226 F.

While government employers are entitled to "sufficient discretion to manage their operations" and therefore "have heightened interests in controlling speech made by an employee in his or her professional capacity," *Garcetti*, 547 U.S. at 422, they have no legitimate interest in preventing government em-

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App'x 883 (11th Cir. 2007); *Carr* v. *City of Camden*, 2012 WL 4051884 (D.N.J. 2012); *Hayburn* v. *City of Phila.*, 2012 WL 3238344 (E.D. Pa. 2012); *Chrzanowski* v. *Bianchi*, 2012 WL 2680800 (N.D. Ill. 2012); *Frisenda* v. *Inc. Vill. of Malverne*, 775 F. Supp. 2d 486 (E.D.N.Y. 2011); *Minten* v. *Weber*, 832 F. Supp. 2d 1007 (N.D. Iowa 2011); *Moore* v. *Money*, No. 2:11-CV-122, 2011 WL 5966957 (S.D. Ohio Nov. 29, 2011); *Ramirez* v. *Cnty. of Marin*, No. C 10-02899, 2011 WL 5080145 (N.D. Cal. Oct. 25, 2011); *Proper* v. *Sch. Bd. of Calhoun Cnty. Fla.*, No 5:10-cv-287-RS-EMT, 2011 WL 3608678 (N.D. Fla. Aug. 12, 2011); *Serianni* v. *City of Venice, Fla.*, No. 8:10-cv-2249-T-33TBM, 2011 WL 2533692 (M.D. Fla. June 27, 2011); *Matthews* v. *Lynch*, No. 3:07-cv-739 (WWE), 2011 WL 1363783 (D. Conn. Apr. 11, 2011), aff'd, 483 Fed. Appx. 624 (2d Cir. 2012); *Whitfield* v. *Chartiers Valley Sch. Dist.*, 707 F. Supp. 2d 561 (W.D. Pa. 2010); *Vaticano* v. *Twp. of Edison*, No. 09-01751 (SDW)(MCA), 2010 WL 4628296 (D.N.J. Nov. 5, 2010); *Reid* v. *City of Atlanta*, No. 1:08-cv-01846-JOF, 2010 WL 1138456 (N.D. Ga. Mar. 22, 2010); *Kerstetter* v. *Pa. Dep't of Corrs. SCI- Coal Twp.*, No. 4:08-CV-1984, 2010 WL 936457 (M.D. Pa. Mar. 12, 2010); *Mullins* v. *City of New York*, 634 F. Supp. 2d 373 (S.D.N.Y. 2009), aff'd, 626 F.3d 47 (2d Cir. 2010); *Foster* v. *Thompson*, No. 05-CV-305-TCK-FHM, 2008 WL 4682264 (N.D. Okla. Oct. 21, 2008); *Davis* v. *City of E. Orange*, No. 05-3720, 2008 WL 4328218 (D.N.J. Sept. 17, 2008); *Evans* v. *Hous. Auth. of City of Benicia*, No. 2:07-CV-0391, 2008 WL 4177729 (E.D. Cal. Sept. 8, 2008); *Hook* v. *Regents of Univ. of Cal.*, 576 F. Supp. 2d 1223 (D.N.M. 2008), aff'd, 394 F. App'x 522 (10th Cir. 2010); *Novak* v. *Bd. of Educ. of Fayetteville-Manlius Cent. Sch. Dist.*, No. 505-CV-199, 2007 WL 804679 (N.D.N.Y. Mar. 14, 2007); *Johnson* v. *LaPeer Cnty.*, No. 04-74659, 2006 WL 2925292 (E.D. Mich. Oct. 11, 2006).

ployees from providing truthful sworn testimony. As the Seventh Circuit recently concluded, "if the defendants here had some legitimate managerial interest in dissuading [the plaintiff] from testifying truthfully pursuant to a subpoena, we cannot imagine what it might be." *Chrzanowski*, 725 F.3d at 742.

When it comes to claims of interference with a government employee's sworn testimony, moreover, it is natural for the judiciary to have a role. *Fairley*, 578 F.3d at 525 ("Even if offering (adverse) testimony is a job duty, courts rather than employers are entitled to supervise the process. A government cannot tell its employees what to say in court, nor can it prevent them from testifying against it." (internal citation omitted) (Easterbrook, J.)). The content of sworn testimony stems from the witness's obligations as a citizen to "tell the truth, the whole truth, and nothing but the truth"—not from the witness's obligations to his or her government employer.

Finally, a determination that truthful sworn testimony is *eligible* for First Amendment protection does not mean that the employee will prevail in every case—even if he or she is able to establish retaliation. The employer would still have the opportunity to show that the retaliatory actions were justified under the *Pickering* balancing test. 391 U.S. at 568. That standard provides additional protections for any employer who can demonstrate a legitimate reason for taking action against an employee who offers truthful testimony.

Ruling in favor of petitioner in this case simply means that claims of retaliation for truthful sworn testimony will not be rejected categorically, and instead may proceed to the balancing stage. That approach properly reconciles the important interests

implicated by this question—the government employer's interest in managing its employees, the employee's interest in fulfilling his or her obligation to speak truthfully when called to testify under oath, and society's interest in obtaining all relevant evidence.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

APR 9 - 2014

No. 13-483

In the Supreme Court of the United States

EDWARD R. LANE,

Petitioner,

v.

STEVE FRANKS, IN HIS INDIVIDUAL CAPACITY, AND SUSAN BURROW, IN HER OFFICIAL CAPACITY AS ACTING PRESIDENT OF CENTRAL ALABAMA COMMUNITY COLLEGE,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF *AMICI CURIAE* THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, INC. AND THE INTERNATIONAL PUBLIC MANAGEMENT ASSOCIATION FOR HUMAN RESOURCES IN SUPPORT OF RESPONDENT STEVE FRANKS

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WIS. STAT. 230.83(2) (2013) 23

DENVER MUN. CODE § 2-106 22

ST. PAUL ADMIN. CODE § 42.01 22

OTHER AUTHORITIES

Richard D. Alaniz, *Managing the Rise of Baseless Whistleblower Retaliation Claims*, ACCOUNTING WEB, July 12, 2013, *available at* http://www.accountingweb.com/print/222071 29

Elletta Sangrey Callahan & Terry Morehead Dworkin, *The State of Whistleblower Protection*, 38 AM. BUS. L.J. 99 (2000) 22

Tracy Gordon, *State and Local Budgets and the Great Recession*, THE BROOKINGS INSTITUTION, Dec. 2012, *available at* http://www.brookings.edu/research/articles/2012/12/state-local-budgets-gordon (last accessed on April 7, 2014) 6-7

The Great Recession, THE STATE OF WORKING AMERICA, *available at* http://stateofworkingamerica.org/great-recession (last accessed April 7, 2014) 6

Larry Morandi, *Eminent Domain Legislation: Post-Kelo Update*, NAT'L CONFERENCE OF STATE LEGISLATURES, Jan. 1, 2012, *available at* http://www.ncsl.org/documents/natres/EminentDomainPost-Kelo.pdf (last accessed April 7, 2014) 29

Charles J. Muhl, *The Employment-At-Will Doctrine: Three Major Exceptions*, MONTHLY LABOR REVIEW 4 (2001), *available at* http://www.bls.gov/opub/mlr/2001/01/art1full.pdf 25

10 J. Richardson, Messages and Papers of the Presidents 98-99 (1899) 9

Kermit Roosevelt III, *Not as Bad as You Think: Why* Garcetti v. Ceballos *Makes Sense*, 14 U. PA. J. CONST. L. 631 (2012) 32, 33, 34

Genna H. Rosten, *Annotation, Wrongful Discharge Based on Public Policy Derived From Professional Ethics Codes*, 52 A.L.R. 5th 405 (1997) 25

U.S. DEPT. OF LABOR, U.S. BUREAU OF LABOR STATISTICS, REP. 1025, EXTENDED MASS LAYOFFS IN 2009 (2010), *available at* http://www.bls.gov/mls/mlsreport1025.pdf 6

INTEREST OF THE *AMICI CURIAE*[1]

The International Municipal Lawyers Association ("IMLA") is a non-profit, professional organization of over 2,500 local government entities, including cities, counties, and special district entities, as represented by their chief legal officers, state municipal leagues, and individual attorneys. Since 1935, IMLA has served as a national, and now international, clearinghouse of legal information and cooperation on municipal legal matters. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the federal and state courts.

IMLA has a strong interest in apprising the Court of the significant adverse consequences facing the nation's local governments if the decision below is reversed. Local governments are collectively one of the nation's largest employers, and employ more people who are called upon to testify in court than any other employer. As such, local governments will be strapped with significant unanticipated and unbudgeted costs if the decision below is reversed by turning state court wrongful termination cases into federal constitutional torts. Private employers will face no similar ramifications. In addition to the economic consequences, the IMLA has a strong interest in

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[1] No counsel for any party has authored this brief in whole or in part, and no party or counsel for a party has made a monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6. Petitioner and both Respondents have filed blanket consents with this Court to the filing of all *amicus* briefs.

ensuring that local government employers are able to effectively manage their workplaces, and the Eleventh Circuit's decision supports their ability to do so without turning federal courts into super personnel grievance boards for public employees.

The members of the International Public Management Association for Human Resources ("IPMA-HR") are human resource professionals and human resource departments at the federal, state, and local levels of government. IPMA-HR has a long history of involvement in public sector employment litigation. The Association's members recognize the importance of maintaining the proper balance between the First Amendment rights of employees and the rights of public employers to ensure efficient and effective government operations.

SUMMARY OF THE ARGUMENT

The undersigned *Amici* condemn the retaliatory dismissal of a government employee by its employer for simply providing truthful testimony. *Amici* also condemn the discharge of employees who are subpoenaed to testify as fact witnesses whether they are government or private employees or whether they are witnesses to a crime, accident, or any other event.

But this case is not about whether a government employer should be allowed to dismiss an employee for testimony the employee provides. The issue here is whether a government employee should be permitted to assert a *constitutional* claim based on the First Amendment when that employee alleges that his or her employer retaliated for speech related to the performance of the employee's job duties. *Amici* submit

that providing such a right conflicts with the precedents from this Court and would have profoundly negative effects on the numerous government employers in this Country, as well as the general public as was so presciently noted by Judge O'Scannlain when he urged this Court to adopt the rule it did in *Garcetti v. Ceballos*, 547 U.S. 410 (2006) for on-the-job work related speech. *See Ceballos v. Garcetti*, 361 F.3d 1168, 1192-93 (9th Cir. 2004) (O'Scannlain, J., concurring), *rev'd*, 547 U.S. 410 (2006). Instead, consistent with *Garcetti* this Court should clarify that a public employee cannot assert a constitutional First Amendment cause of action for speech related to the performance of that employee's job duties.

For much of our nation's history, public employees could not assert a First Amendment cause of action against their employer for retaliation based on the employee's speech. While this Court subsequently "qualified" the absolute exclusion of the First Amendment from the government employment context, it has nevertheless been appropriately reluctant to expand the First Amendment's reach too far in recognition of the difference between the government acting as an employer and the government acting as a sovereign.

Consistent with its prior precedents, this Court's decision in *Garcetti* explained that the First Amendment does not provide a cause of action where a government employee acts pursuant to his or her job duties. The factual focus of *Garcetti* gave this Court no occasion to specifically address whether speech related to the performance of one's job duties that is made in a context where the employee does not typically speak as

part of their job duties is also outside the reach of the First Amendment, but this Court's precedents compel the same treatment for such speech. Furthermore, the analysis does not change because speech is made as part of testimony or in response to a subpoena; particularly given that protection of that speech will likely increase the litigation burden faced by local governments, and will lead to suffocating federal court oversight of government employment disputes.

Ultimately, this Court should decline Petitioner's invitation to move away from *Garcetti*. Constitutionalizing employee grievances like the one at issue here would "jeopardize the delicate balance" between the rights of public employees and the interests of government employers established by the relevant legislative bodies, and unnecessarily graft a rigid and inflexible framework over the government employment sphere. *See Enquist v. Oregon Dept. of Agr.*, 553 U.S. 591, 607 (2008).

Leaving cases such as this out of the constitutional realm will allow the democratic process to continue to tweak and tailor appropriate statutes to balance the public policy concerns this Court expressed in *Garcetti*. As *Garcetti* recognized, the public has an interest in some speech of government employees. *See Garcetti*, 547 U.S. at 419. Critically, however, it is *the public's* interest and therefore it is *the public's* job to express that interest through its democratically elected representatives. The Court can and should rely on the legislative process to ensure that the public's interest is protected in the manner the public determines most appropriate.

STATEMENT

Petitioner Edward Lane ("Lane") held a position as the Director of the Community Intensive Training for Youth Program ("CITY") at Central Alabama Community College ("CACC") from September 2006 to January 2009. Pet. App. at 2a-3a. The appointment was probationary. *Id.* at 10a. As part of his job, Lane ran CITY, including day-to-day operations, hiring and firing of employees, and making financial decisions. *Id.* at 10a.

Shortly after beginning his job at CITY, Lane discovered Suzanne Schmitz ("Schmitz") was listed on CITY's payroll but was not reporting for work and had not otherwise performed work for CITY. *Id.* at 2a, 11a. Evidently both of Lane's predecessors had sought to correct this problem, including enlisting the assistance of the College President who supported their efforts. *U.S. v. Schmitz*, 634 F.3d 1247, 1253-55 (11th Cir. 2011). Lane ultimately fired Schmitz on October 19, 2006, pursuant to his job responsibilities, after she refused to report to work. *Id.* Lane was not fired after taking that action. As the decision below recognized, "[n]o one disputes that Lane was acting pursuant to his official duties as CITY's Director when he investigated Schmitz's work activities, spoke with Schmitz and other CACC officials about Schmitz's employment, and ultimately terminated Schmitz's employment." *Id.* at 7a; *see also id.* at 10a.

On November 13, 2006, following an investigation by the FBI, Lane testified before a grand jury against Schmitz. *Id.* at 12a. Lane was not fired after he testified at the grand jury. Then again, in August of 2008, Lane was subpoenaed to testify and did testify in

Schmitz's criminal trial in federal court about his interactions with Schmitz in his capacity as her supervisor. Pet. App. at 2a-3a, 12a-13a. Lane's testimony concerned information that Lane learned while performing his duties as director of the CITY program and that led to his ultimate decision to fire Schmitz. Pet. App. at 3a. Specifically, "the subject matter of Lane's testimony touched only on acts he performed as part of his official duties." Pet. App. at 7a.

Approximately four months after Lane testified at Schmitz's 2008 criminal trial, on January 9, 2009, Respondent Steve Franks asserts that Lane was effectively laid off from his position, along with 28 other CITY employees for financial reasons. Pet. App. at 3a-4a, 12a-14a. The layoffs occurred at a time when nationwide layoffs were regular news in a period we refer to as the "Great Recession." U.S. DEPT. OF LABOR, U.S. BUREAU OF LABOR STATISTICS, REP. 1025, EXTENDED MASS LAYOFFS IN 2009 (2010), *available at* http://www.bls.gov/mls/mlsreport1025.pdf.[2] Respondent Steve Franks asserts that he thereafter rescinded the layoff of certain employees due to an ambiguity in their probationary service. *See* Pet. App. at 3a-4a, 16a. Approximately seven months later the entire CITY program upon which Petitioner's job was based was eliminated due to budgetary issues and the remaining employees were laid off. *Id.* at 15a-16a; *see also* Tracy Gordon, *State and Local Budgets and the*

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[2] In 2008 and 2009, the U.S. labor market lost 8.4 million jobs. *See The Great Recession*, THE STATE OF WORKING AMERICA, *available at* http://stateofworkingamerica.org/great-recession (last accessed April 7, 2014).

Great Recession, THE BROOKINGS INSTITUTION, Dec. 2012, *available at* http://www.brookings.edu/research/articles/2012/12/state-local-budgets-gordon (last accessed on April 7, 2014) (discussing dramatic drop in state and local revenues during Great Recession and noting that even with stimulus, "federal funds did not offset state and local revenue losses").

Sometime after Lane was dismissed he was again subpoenaed to testify and once again testified at Schmitz's February 2009 trial. Pet. App. at 12a-13a; *U.S. v. Schmitz*, 634 F.3d 1247, 1253-55 (11th Cir. 2011). Nearly two years later, and with no prior warning to his employer, Lane brought suit in district court alleging a First Amendment retaliation cause of action against Respondent Steve Franks. *See* Pet. App. at 18a; Resp. Steve Franks Br. at 13.[3]

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[3] *Amici* submit that plausibility and rationality collide against the idea that Petitioner's employers: (1) did not fire him for ignoring their counsel on the issue of Schmitz's employment; (2) did not fire him for firing Schmitz; and (3) did not fire him for testifying at the Grand Jury in 2006, but instead waited over two years after he testified at the Grand Jury to base the firing decision on the fact that he testified about his termination of Schmitz for misconduct. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). This is particularly so, given that such action would risk prosecution from the United States Attorney for obstruction of justice, especially if Lane believed his termination prior to the February 2009 trial was retaliatory.

ARGUMENT

I. The First Amendment Should Not Provide a Cause of Action Where an Employee Claims His or Her Employer Retaliated Against Speech Related to the Performance of the Employee's Job Duties.

Amici support Respondent Steve Frank's position that *Garcetti* should be read to support the "citizen analogue" framework for determining whether the First Amendment should apply to particular speech made by the employee.[4]

Amici further argue that this Court should not turn a state court wrongful termination case into a federal constitutional tort by limiting *Garcetti* as Petitioner and his *amici* suggest. Instead, this Court should clarify that pursuant to *Garcetti* public employees cannot assert a First Amendment cause of action based on retaliation for speech made by a public employee that is related to the performance of that employee's job duties.

A. The Application of the First Amendment to the Government Employment Context Is a Recent Development, and That Expansion Remains Only a Qualification to the Original Prohibition.

For much of our nation's history, government employers did not have to concern themselves with the application of the First Amendment to their

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[4] *Amici* also agree that Respondent Steve Franks is entitled to qualified immunity.

managerial decisions. *See Garcetti*, 547 U.S. at 417. Indeed, it was recognized that the First Amendment did not apply to government retaliation for employee speech. As Justice Holmes famously explained while sitting on the Supreme Judicial Court in Massachusetts, a policeman "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 220 (1892) (Holmes, J.). That view reflected the view held by this Court for decades until as recently as 1952. *See, e.g., Adler v. Board of Education*, 342 U.S. 485 (1952).

In fact, the common and accepted practice for a significant portion of our nation's history actually conditioned government employment on the relinquishment of free-speech rights. *See United States Civil Service Comm'n v. Nat'l Ass'n of Letter Carriers AFL-CIO*, 413 U.S. 548, 557 (1973) (describing "spoils system" under which federal employment "depend[ed] upon party service and changing administrations, rather than meritorious performance"). Even Thomas Jefferson once approved an order that prohibited officers of the Executive Branch from participating in "electioneering" or in any way attempting "to influence the votes of others." *Id.* (quoting 10 J. Richardson, Messages and Papers of the Presidents 98-99 (1899)).

In 1968, this Court qualified the established dogma by holding that "public employees do not surrender all their First Amendment rights by reason of their employment." *Garcetti*, 547 U.S. at 417 (citing *Pickering v. Bd. of Educ. of Township High School Dist. 205, Will Cty.*, 391 U.S. 563, 568 (1968)). But even as it qualified the long-standing exclusion of the First

Amendment from the government employment context in *Pickering*, this Court still recognized that "the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." *Pickering*, 391 U.S. at 568.

Following *Pickering*, the Court was careful to ensure that the critical distinction between the role of government as employer and sovereign was maintained, and that the First Amendment did not constitutionalize public employee grievances. Accordingly, in *Connick*, the Court held that the discharge of a former assistant district attorney for circulating a questionnaire did not violate the First Amendment and noted that "the First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs." *Connick v. Myers,* 461 U.S. 138, 149 (1983). Likewise, in *Garcetti* this Court noted the prior established dogma and explained that it had been "qualified in important respects" such that "in certain circumstances" the First Amendment may protect public employee speech. *Garcetti*, 547 U.S. at 417. The Court then held that the facts before it did not suffice because "the First Amendment does not prohibit managerial discipline based on an employee's expressions made pursuant to official responsibilities." *Id.* at 424.

B. This Court Has Consistently Recognized That the Government Is Subject to Far Less Constitutional Restrictions When Acting As An Employer Than When Acting As a Sovereign.

The historical treatment of the First Amendment in the government employment context is due in large part to the unique role played by the government when acting as an employer and not a sovereign. This Court has consistently and regularly recognized that the critical distinction must be maintained because "[g]overnment employers, like private employers, need a significant degree of control over their employees' words and actions" or "there would be little chance for the efficient provision of public services." *Garcetti*, 547 U.S. at 418. That is why this Court has traditionally "afford[ed] government employers sufficient discretion to manage their operations" and emphasized the importance of ensuring there is no "displacement of managerial discretion by judicial supervision." *Id.* at 422-23. As a result, the Court has explained that "the government as employer . . . has far broader powers than does the government as sovereign." *Waters v. Churchill*, 511 U.S. 661, 671 (1994).

In fact, in many contexts it has long been held that the Government is subject to a lower level of constitutional scrutiny when it is not exercising its power to legislate, regulate or license. *U.S. v. Kokinda*, 497 U.S. 720, 725 (1990) (citations and quotations omitted). Indeed, "[w]here the government is acting as a proprietor, managing its internal operations, rather than acting as lawmaker with the power to regulate or license, its action will not be subjected to the

heightened review to which its actions as a lawmaker may be subject." *International Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992). This fundamental truth has been recognized "in many contexts, with respect to many different constitutional guarantees." *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 94 (1990) (Scalia, J., dissenting).

But perhaps the most fundamental result of the unique role of the government specifically acting as employer is that this Court has repeatedly rebuffed attempts by public employees to "constitionalize the employee grievance." *Garcetti*, 547 U.S. at 420 (quoting *Connick*, 461 U.S. at 154). Accordingly, and "[g]iven the 'commonsense realization that government offices could not function if every employment decision became a constitutional matter,' 'constitutional review of government employment decisions must rest on different principles than review of . . . restraints imposed by the government as sovereign.'" *Enquist*, 553 U.S. at 599 (citations omitted).

C. The First Amendment Should Not Provide a Cause of Action Where the Speech at Issue Relates to the Performance of an Employee's Job Responsibilities.

Consistent with the above-cited precedents, this Court held in *Garcetti* that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Garcetti*, 547 U.S. at 421. According to the Court, "[r]estricting speech *that owes its existence to a public employee's professional responsibilities* does not

infringe any liberties the employee might have enjoyed as a private citizen." *Id.* at 421-22 (emphasis added).

Here the speech offered in Petitioner's testimony clearly "owe[d] its existence to [his] professional responsibilities" while working as an employee of CACC. *See id.* His job was to run the CITY program, including day-to-day operations, hiring and firing of employees, and making financial decisions. Pet. App. at 10a. Part of those day-to-day operations included supervising and managing Schmitz. *Id.* at 2a, 11a. After he fired her pursuant to his duties, he was ultimately asked to testify about those duties and the circumstances that led to her termination. *Id.* at 12a.

His testimony concerned information he learned while performing his duties as director of the CITY program and "touched only on acts he performed as part of his official duties." Pet. App. at 3a, 7a. His speech in this context held no personal opinion; it merely recounted his interactions with Schmitz and others while performing his job. *See Ceballos*, 361 F.3d at 1188-89 (O'Scannlain, J., concurring) ("While it has rarely been stated explicitly by the Supreme Court, the implicit premise underlying the First Amendment's hostility toward viewpoint-driven rules abridging the freedom of speech is that such constraints impermissibly infringe upon individuals' freedom of choice to express *their personal* opinions or to otherwise express *themselves*.") (emphasis in original).

It is true, as Petitioner claims, that the statement at issue in *Garcetti* was made as a direct result of Ceballos' performance of his typical job duties. *Garcetti*, 547 U.S. at 421. Petitioner uses this fact to

criticize the decision below, Pet. Br. at 26-34, but just because this Court determined that the First Amendment did ***not*** apply to situations such as Ceballos' does not mean that all other job related speech is now covered by the First Amendment. In fact, the evolution of this area of law demonstrates the opposite to be true.

As *Garcetti* explained, the prior "unchallenged dogma" "that a public employee had no right to object to conditions placed upon the terms of employment – including those which restricted the exercise of constitutional rights" has not been abandoned. *Garcetti*, 547 U.S. at 417; *see also supra* Part I.A. Instead, that default rule has simply "been qualified in important respects" and now "in certain circumstances" the First Amendment protects a public employee's right to speak as a citizen on matters of public concern. *Garcetti*, 547 U.S. at 417. After *Garcetti*, those "circumstances" clearly do not include speech made pursuant to a government employee's job duties where the employee was performing a task the employee typically performs as part of his or her job. *See id.* at 421. Given the factual focus in *Garcetti*, this Court did not discuss whether speech related to the performance of a government employee's job duties made in a context where the employee does not typically speak as part of his or her job duties is protected by the First Amendment.

This Court can now clarify *Garcetti* by holding that speech related to the performance of one's job duties is *also* not covered by the First Amendment even if that speech is made in a context where the employee does not typically speak as part of his or her job duties

because that speech "owes its existence" to the performance of that job duty. *See id.* at 421-22. This case presents a perfect opportunity for this Court to make such a clarification because Petitioner's testimony expressed no personal opinion and relayed solely factual information about the performance of his job duties. Pet. App. at 3a, 7a. As a result, he did not truly step outside his role as an employee by expressing any personal opinions.

Such a rule would not require a departure from this Court's decision in *Pickering* because government employees would be able to express their opinions on general information they learned while at work. *See Pickering*, 391 U.S. at 570-72. And, as in *Pickering*, they would be able to speak in public forums and in public debate and bring suit to advance the public's interest on matters of public concern. They would simply not be entitled to a constitutional cause of action based on the First Amendment for speech concerning the performance of their job duties. Such a rule would also align partially with the approach advocated by Co-Respondent Susan Burrow, because it would exclude from the First Amendment only speech related to what an employee had been paid by the government to do, and not more generally any information obtained in the course of employment. *See* Resp. Susan Burrow Br. at 14-21.

That clarification recognizes the fundamental truth that most government employers and employees would consider responding to a subpoena for testimony related to their job duties to be part of their job even if it is not formally described in an official policy. *See Garcetti*, 547 U.S. at 424-25 ("Formal job descriptions

often bear little resemblance to the duties an employee actually is expected to perform, and the listing of a given task in an employee's written job description is *neither necessary nor sufficient* to demonstrate that conducting the task is within the scope of the employee's professional duties for First Amendment purposes.") (emphasis added).

D. The Fact That Lane's Speech Was Offered In a Testimonial Context and In Response to a Subpoena Should Not Alter the Analysis.

Petitioner and his *amici* focus on the claim that Petitioner testified truthfully, and claim that such speech must be protected by the First Amendment. While truthful speech has undoubtedly been an essential part of our democracy since its inception, it has also been subordinated for much of our nation's history to the interests of the government acting in the role of an employer. As noted above, the application of the First Amendment to the government employment context remains a relatively recent phenomenon. *See supra* Part I.A. As this Court explained in *Garcetti,* that historical treatment has not been wholly abandoned, but rather "qualified in important respects." *Garcetti,* 547 U.S. at 417.

Indeed, *Amicus Curiae* First Amendment Coalition cites to statements from both Thomas Jefferson and Justice Holmes in support of the historical appreciation of the importance of truthful speech. First Amendment Coalition Br. at 3. As noted above, however, both of those great men recognized that government in the role of the employer was ***not*** subject to the restrictions of the First Amendment. *See supra* Part I.A. Justice

Holmes is *particularly* known for his position that government employees cannot use the First Amendment to shield them from retaliatory action, *McAuliffe*, 155 Mass. at 220 (Holmes, J.), and Thomas Jefferson certainly acted in a manner consistent with that view. *See United States Civil Service Comm'n*, 413 U.S. at 557.

By constitutionalizing the employee grievance in the manner they advance, Petitioner and his *amici* would turn state court wrongful termination cases into federal constitutional torts and effectively seek to have the judiciary make nuanced and context-sensitive judgments about the quality of speech or its social appropriateness. Petitioner and his *amici* attempt to downplay the dangerous potential for increased and constitutionalized litigation by claiming meritless claims will be relatively easily disposed of, yet Petitioner's own implausible claim belies that argument, and as this court explained in *Enquist,* such arguments are "beside the point." *Enquist*, 553 U.S. at 608.

The practical problem of constitutionalized employment litigation is not whether claims will ultimately succeed, but "that governments will be forced to defend a multitude of such claims in the first place, and courts will be obliged to sort through them in a search for the proverbial needle in a haystack." *Id.*; *see also Garcetti*, 547 U.S. at 449 (Breyer, J., dissenting) ("the ability of a dissatisfied employee to file a complaint, engage in discovery, and insist that the court undertake a balancing of interests . . . itself may interfere unreasonably with both the managerial function . . . and with the use of other grievance –

resolution mechanisms, such as arbitration, civil service review boards, and whistle-blower remedies, for which employees and employers may have bargained or which legislatures may have enacted."). The resulting damage to the efficient functioning of state and local government employers would be particularly crippling because state litigation would become federalized and drain their already limited resources.

Petitioner and his *amici* create a viscerally appealing argument that in an environment of political correctness seeks to have the Court announce some form of immunity under the First Amendment for government employee testimony. Yet, that span of immunity surely cannot be protective of all speech. *See Ceballos*, 361 F.3d at 1191-92 (O'Scannlain, J. concurring) ("The majority's response is long on policy, but short on the law. Its argument is seductively simple: Because whistleblowers play an important role in rendering government accountable, the First Amendment must protect their whistleblowing activities. How can anyone disagree with that general principle? . . . This case – and the doctrine it ratifies – thus implicates more than the too-common tendency of well-intentioned jurists to squeeze a policy-oriented square peg into a round constitutional hole.") (citations omitted).

All agree that *un*truthful speech should get no protection, and we assume Petitioner would agree that testimonial speech admitting to a crime finds no First Amendment protection from criminal prosecution. But what about speech where employers should be able to dismiss employees for their testimony concerning the performance of their job duties: an employee divulging

his own misconduct on the job or where an employee admits in testimony during an administrative proceeding or a divorce to having an affair while on the clock?[5]

While Petitioner assumes that the truthful nature of an employee's testimony is known or easily knowable, the following hypothetical demonstrates that determining whether speech is truthful can be an uncertain and arduous inquiry. Suppose a city decides to employ armed police officers to protect its schools following the tragedies of school massacres. Police officers A, B and C are all employed to fill these positions. During a scuffle outside a school where all three are employed, the officers engage an unruly teenager who they ultimately arrest for resisting arrest and assault. Officers A and B testify in the criminal trial that the teenager was aggressive, assaulted Officer A, and was arrested for the assault and for resisting arrest. Officer C testifies that Officer A was actually the aggressor and that both A and B used force after the teen was subdued. The teenager is acquitted at trial and brings a Section 1983 action against the city and its Officers A and B. The officers all testify as they had in the criminal trial and a jury determines

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[5] *See, e.g., Krocka v. Police Bd. of City of Chicago*, 762 N.E.2d 577, 587 (Ill. App. Ct. 2001) ("The hearing officer heard Krocka state that he testified in federal court that he had patronized prostitutes while on duty, falsified his departmental health appraisal, consumed alcohol while on duty, and used vulgar language toward or about an assistant corporation counsel while in federal court. The Board also received a copy of Krocka's sworn federal court testimony.").

that none of the officers or the city have liability, rendering a defense verdict.

Due to the Great Recession and poor financial management, the city's new administration ends the program and Officers A, B and C are each laid off. All claim retaliation. Officer C claims retaliation for his testimony against the city and Officers A and B claim retaliation because they believe the city felt it should not have lost the criminal trial and that their testimony exposed the city to liability.

Under this scenario, a court might reach different conclusions over which testimony was truthful A's, B's, or C's. Under the rule proposed by the Petitioner only the officer whose testimony the court concludes was truthful finds the safe harbor of immunity from discharge. Establishing a rule based on such value judgments simply does not work.[6]

II. Providing a First Amendment Cause of Action for Speech Related to the Performance of One's Job Duties Would Amount to Constitutionalizing the Employee Grievance and Harm Government Employers and the Public at Large.

Petitioner and his *amici* would have this court believe that by not extending the First Amendment to

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[6] Additionally, Petitioner's focus on subpoenas would not assist in that situation if all of the officers were subpoenaed. In any event, the relative ease with which a subpoena can be obtained makes it an odd choice on which to base constitutional distinctions. *See, e.g.*, R.I. GEN. LAWS ANN. § 9-17-3 (West 2013) (providing that even a notary public can issue a subpoena).

provide public employees with a cause of action against their employers for retaliating against their testimonial speech their employers will have the right to terminate them with impunity. But we are not writing on a blank slate here. Numerous statutory and common law remedies exist to provide public employees relief under such circumstances. *See Garcetti*, 547 U.S. at 425 (explaining that a "powerful network of legislative enactments – such as whistle-blower protection laws and labor codes [are] available to those who seek to expose wrongdoing.").

By attempting to constitutionalize the employee grievance in the manner they propose, Petitioner and his *amici* "jeopardize the delicate balance" Federal, State and local governments have struck concerning the treatment of whistleblowers. *See Enquist*, 553 U.S. at 607.

A. Constitutionalizing the Employee Grievance As Petitioner Requests Would Needlessly Enshrine a Rigid and Unchangeable Cause of Action Into the Government Employment Context to Address a Perceived Problem Better Left to the Democratic Process.

"[N]ot every procedure that may safeguard protected speech is constitutionally mandated." *Waters*, 511 U.S. at 670. Petitioner and his *amici* advance a "problem" that they assert is in need of a solution, but numerous non-constitutional remedies are available to address a retaliatory dismissal of an employee in response to his or her testimony. Furthermore, because they are not constitutional remedies, they are flexible to adapt to the changing

interests sought to be advanced by the public as expressed through their elected representatives.

1. Numerous Statutory and Common Law Remedies are Available to Address Petitioner's Perceived Problem.

All fifty states, and the District of Columbia, have enacted some form of whistleblower protection laws. *See* Elletta Sangrey Callahan & Terry Morehead Dworkin, *The State of Whistleblower Protection*, 38 AM. BUS. L.J. 99, 108 (2000).[7] Most states have adopted a general comprehensive whistleblower law, but some have elected to target specific provisions of the law or particular industries. *Id.*; *see, e.g.*, N.M. STAT. ANN. § 28-17-19 (Michie 1999); VA. CODE ANN. §§ 40.1-51.2 (Michie 2013).

Additionally, several municipalities have adopted ordinances that protect whistleblowers. *See, e.g.*, ST. PAUL ADMIN. CODE § 42.01; DENVER MUN. CODE § 2-106. State statutes also commonly extend whistleblower protections to municipal, as well as state, employees. *See, e.g.*, ARK. CODE ANN. § 21-1-601 *et seq.* (Michie 2013); LA. REV. STAT. ANN. § 42:1169 (West 2013); MISS. CODE ANN. § 25-9-171 *et seq.* (2013).

To be sure, these laws and their treatment in each state are not uniform. The Florida whistleblower statute, for example, requires the employee to show a

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[7] *See also Ceballos*, 361 F.3d at 1192 (O'Scannlain, J., concurring) ("How strange it must now be for the hundreds, if not the thousands, of legislators throughout this country who have voted to enact or to retain [whistleblower] laws now to discover that their votes were essentially meaningless").

violation of a statute. *See Taylor v. Memorial Health Systems, Inc.*, 770 So.2d 752, 754 (Fla. App. 5 Dist. 2000) (interpreting FLA. STAT. ANN. § 448.102 (West 1981 & Supp. 1995)). Some states require the employee to first inform their employer of the problem to afford the employer an opportunity to correct it. *See, e.g.*, N.H. REV. STAT. ANN. § 275-E:2 (2014). Some states do not protect whistleblowers who act in "consideration of personal benefit." PA. STAT. ANN. tit. 43, § 1422 (West 2014); W. VA. CODE, § 6c-1-2 (2014); *see also* WIS. STAT. 230.83(2) (2013) (offering protection under certain circumstances). Different states have allocated the burden of proof differently as well. *Compare Davidson v. Commonwealth, Dept. of Military Affairs*, 152 S.W.3d 247, 251 (Ky. App. 2004) *with Raphael v. Okyiri*, 740 A.2d 935, 957 (D.C. 1999).

Other States have also adopted whistleblower statutes that apply specifically to the employees of municipal governments. *See, e.g.*, CAL. GOV'T CODE § 53298(a) *et seq.* (West 2014); WASH. REV. CODE ANN. § 42.41.010 *et seq.* (West 2014). In fact, Connecticut, for example, provides greater protection for employees of lower levels of government than for employees of the State. *See* CONN. GEN. STAT. ANN. § 31-51m(b) (West 2014).

Amicus Government Accountability Project ("GAP") asserts that the existing protections for employees are insufficient because "existing state whistleblower protection laws are a patchwork" and "[o]n the state level, protections vary widely with respect to the categories of government employees covered, the employee activity that can constitute protected

'whistleblowing,' and other requirements." Gov. Accountability Project Br. at 3-4, 16-17.

But what *Amicus* GAP fails to appreciate is that those nuances and variations are the appropriate product of the democratic process in our federal system. Rather than a one-size-fits-all solution to the competing concerns inherent in the encouragement of whistleblowing, the various States have taken different approaches to balance the competing concerns of potential whistleblowers and their employers. *See Smith v. Robbins*, 528 U.S. 259, 273 (2000) (noting this Court's "established practice, rooted in federalism, of allowing the States wide discretion, subject to the minimum requirements of the Fourteenth Amendment, to experiment with solutions to difficult problems of policy.").

Petitioner similarly claims that existing protections are insufficient simply because Petitioner's whistleblower claim failed below. *See* Pet. Br. at 23 n.7. But the citizens of Alabama have made a policy decision not to extend certain whistleblower protections to certain employees. They are free by legislative action to weigh the interests of employers and employees and fashion their own solution to the issue.

While *Amicus* GAP and Petitioner decry the potentially disparate treatment of whistleblowers, they offer no explanation as to why government employees should be afforded *constitutional* relief for whistleblowing in the form of the First Amendment while their private employee counterparts are left to rely solely on statutory relief. Indeed, *Amicus* GAP laments the fact that "Enron was able to engage in retaliation against employee whistleblowers based on

a gap in then-existing law." Gov. Accountability Project Br. at 16 (citing *Lawson v. FMR LLC*, 134 S. Ct. 1158, 1162 (2014)). But Enron was not a government employer, so the First Amendment would not have afforded any relief to those employees even under the expansive application offered by Petitioner and his *amici*.

Additionally, whistleblower statutes are not the only remedy available for government employees who have been retaliated against for their testimony as "[a] majority of states have adopted a public-policy exception to the employment-at-will rule. The public-policy exception states that an employee will have a claim for wrongful discharge if the discharge contradicts public policy." Genna H. Rosten, Annotation, *Wrongful Discharge Based on Public Policy Derived From Professional Ethics Codes*, 52 A.L.R. 5th 405 (1997). While Alabama has not recognized the public policy exception to at-will employment, it has recognized the implied contract exception and the covenant of good faith and fair dealing exception. *See* Charles J. Muhl, *The Employment-At-Will Doctrine: Three Major Exceptions*, MONTHLY LABOR REVIEW 4 (2001), *available at* http://www.bls.gov/opub/mlr/2001/01/art1full.pdf; *Ex Parte Amoco Fabrics and Fiber Co.*, 729 So.2d 336 (Ala. 1998); *Hoffman-La Roche, Inc. v. Campbell*, 512 So.2d 725 (Ala. 1987). In fact, Alabama is one of only eleven states to recognize the covenant of good faith exception. *See* Muhl, *supra* at 4. Additionally, Alabama has specifically outlawed witness tampering and defined the crime broadly as the "attempt[] to induce a witness" to "[t]estify falsely or unlawfully withhold testimony, or [a]bsent himself from any official proceeding to which he has been

legally summoned." ALA. CODE § 13A-10-124 (2014). Furthermore, it is a reckless employer who terminates a federal witness in retaliation for testimony in a criminal trial so as to subject themselves to criminal liability for obstruction of justice. *See, e.g.*, 18 U.S.C. §§ 1512-14 (2014).[8]

It is simply not the case that the absence of First Amendment protection here means that government employers will gain the "right" to retaliate against their employees for testimony they give. Those employers will remain subject to the existing rules and regulations applicable to them. *See Garcetti*, 547 U.S. at 425 (explaining that a "powerful network of legislative enactments – such as whistle-blower protection laws and labor codes [are] available to those who seek to expose wrongdoing."). In fact, the testimonial context is a particularly appropriate one in which to rely on existing statutes, as retaliatory dismissal for truthful testimony could specifically implicate obstruction of justice and witness tampering statutes that would not be relevant with other claims of retaliatory discharge. *See, e.g.*, 18 U.S.C. §§ 1512-14 (2014); ALA. CODE § 13A-10-124 (2014).

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[8] The Schmitz case was a highly publicized and significant prosecution involving political corruption in Alabama. The United States prevailed after a lengthy investigation and two criminal trials in bringing Schmitz to justice and in exposing a corrupt legislature. Nothing in Petitioner's or his *amici*'s submissions suggest that Petitioner ever sought protection from the United States Attorney under these laws, nor is there any reason to believe that if noticed, the United States Attorney would have declined to protect Petitioner. *Amici* suggest the claim of retaliation here was an afterthought, discrediting the plausibility of Petitioner's lawsuit. *See Ashcroft*, 556 U.S. at 678.

2. Federal, State, and Local Legislatures Are the Appropriate Bodies to Address Petitioner's Perceived Problem to the Extent Existing Remedies Fall Short.

This Court has recognized the importance of legislatures in fashioning the appropriate remedies available to government employees. In *Enquist* this Court rejected the employee's attempt to "jeopardize the delicate balance governments have struck between the rights of public employees and the government's legitimate purpose in promot[ing] efficiency and integrity in the discharge of official duties." *Enquist*, 553 U.S. at 607 (citations and quotations omitted). The Court offered the example of the Civil Service Reform Act, which covers most federal employees but specifically excludes some groups of employees from its protection as an example of the legislative process finding a better solution. *Id.* (citing 5 U.S.C. § 2302(a)(2)(C) (2004)).

According to the Court, applying the Equal Protection Clause to review allegedly arbitrary employment action would "undo[] Congress's (and the States') careful work." *Id.* Quoting a First Amendment employment context case, the Court explained that its decision was guided by "the 'common-sense realization that government offices could not function if every employment decision became a constitutional matter.'" *Id.* (quoting *Connick*, 461 U.S. at 143). Petitioner and his *amici* seek to fashion a one-size-fits-all remedy, but fail to see that doing so would "jeopardize the delicate balance governments have struck" in enacting whistleblower statutes and other protections against retaliatory discharge. *See id.*

The Enron example provided by *Amicus* GAP demonstrates precisely why the "problem" presented by Petitioner and his *amici* does not require a *constitutional* solution. As this Court explained in its recent decision in *Lawson v. FMR LLC*, following the Enron scandal "Congress identified the lack of whistleblower protection as 'a significant deficiency' in the law" and enacted Section 806 of Sarbanes–Oxley to "address[] th[at] concern." 134 S. Ct. 1158, 1162-63 (2014); *see also* 18 U.S.C. § 1514A (2010). In that same decision the Court responded to concerns raised by one of the parties and noted that if its interpretation of a provision of that statute generated a flood of claims "Congress c[ould] easily fix the problem by amending § 1514A explicitly to remove personal employees of public company officers and employees from the provision's reach." *Lawson*, 134 S. Ct. at 1173. Of course, such a revision would not be possible with a *constitutional* resolution of the issue.

So while the statutory protection at the time of the Enron scandal may have proved inadequate, the relevant legislative body was able to adjust to experience and fashion a new statutory remedy to strike a more appropriate balance between the interests of the employer and the interests of the potential whistleblower employees. In doing so, it had access to all the policy tools unique to the legislative branch of government to weigh all relevant considerations when reaching the appropriate balance. Likewise, if this Court's most recent decision in *Lawson* jeopardizes Congress's delicate balance in Sarbanes-Oxley, Congress is free to amend it to stem any flood of claims that could result.

The "powerful network of legislative enactments" presently available are more than sufficient to address Petitioner's perceived problem, and if more is required the democratically elected legislatures can pass additional statutes. *Garcetti,* 547 U.S. at 425.[9] More critically, legislatures are free to flexibly address the problem in a comprehensive manner to ensure a "delicate balance" is struck between the needs of the government and the needs of its employees. *See Enquist,* 553 U.S. at 607. Such a balance includes making appropriate distinctions between types of employees, types of criticisms, areas of employment, and other relevant factors in a way not achievable in the court system.

That flexibility has never been more important than now, as concerns grow concerning the dramatic expansion in the number of meritless whistleblower actions that have been brought against government employers. *See* Richard D. Alaniz, *Managing the Rise of Baseless Whistleblower Retaliation Claims*, ACCOUNTING WEB, July 12, 2013, *available at* http://www.accountingweb.com/print/222071 (last accessed April 7, 2014) (noting "according to OSHA's own

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[9] For example, the public response and resulting legislation following this Court's decision in *Kelo v. City of New London, Connecticut*, 545 U.S. 469 (2005) demonstrates how quickly the public can act through its legislative bodies when it perceives a problem with a recent judicial interpretation as long as the interpretation permits such legislative remedies. *See* Larry Morandi, *Eminent Domain Legislation: Post-Kelo Update*, NAT'L CONFERENCE OF STATE LEGISLATURES, Jan. 1, 2012, *available at* http://www.ncsl.org/documents/natres/EminentDomainPost-Kelo.pdf (last accessed April 7, 2014) (discussing amendments of laws and state constitutions in response to the *Kelo* decision).

statistics, a mere 2 percent of claims were found to merit agency action"). Time will tell if this wave of baseless whistleblower actions is a serious issue in need of a legislative response, or simply the product of the most recent recession; but what is unquestionably true is that the fact that such causes of action are statutory and not constitutional means they can be adjusted and adapted as society sees fit.

In addition to providing a malleable and adjustable framework rather than a fixed and rigid constitutional tort, the legislature, with access to hearings, public comment, and other policy tools, can fashion remedies that are clear and easy to follow by both employers and employees alike. It is no secret that judicial tests and limits can sometimes be difficult to predict and follow in practice. It is further no secret that the pace of judicial change can often be glacial and fall significantly behind the needs of society.

As *Garcetti* acknowledged, the public has an interest in "receiving the well-informed views of government employees engaging in civic discussion." *Garcetti*, 547 U.S. at 419. But the advancement of the public's interest in that regard is better left to the public to address through its democratically elected legislatures. It is not the province of this Court to craft solutions to such policy issues, particularly in light of the policy tools available to legislative bodies to fashion and later adjust the perfect remedies to problems presented. *See Ceballos*, 361 F.3d at 1192-93 (O'Scannlain, J., concurring).

As this Court has recognized, "[t]he relations between the United States and its employees have presented a myriad of problems with which the

Congress over the years has dealt . . . Government employment gives rise to policy questions of great import, both to the employees and to the Executive and Legislative Branches." *U.S. v. Gilman*, 347 U.S. 507, 509 (1954). In declining to create a new nonstatutory *Bivens* remedy in that context, this Court explained that Congress had already created "an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations." *Bush v. Lucas*, 462 U.S. 367, 388 (1983). The Court explained that Congress was in a "far better position" to consider the policy ramifications of a new ground for relief because "it . . . may inform itself through factfinding procedures such as hearings that are not available to the courts." *Id.* at 389. The Court declined to create a new *Bivens* action "permit[ing] a federal employee to recover damages from a supervisor who ha[d] improperly disciplined him for exercising his First Amendment rights . . . because [the Court was] convinced that Congress is in a better position to decide whether or not the public interest would be served by creating it." *Id.* at 390.

In light of this, it is not surprising that this Court's decision in *Garcetti* recognized that while "[e]xposing governmental inefficiency and misconduct is a matter of considerable significance," the sound judgment of public employers and a "powerful network of legislative enactments – such as whistle-blower protection laws and labor codes – [are] available to those who seek to expose wrongdoing." 547 U.S. at 425. Those protections, and numerous others, "protect employees and provide checks on supervisors who would order unlawful or otherwise inappropriate actions." *Id.* at 426. An additional extension of the First Amendment

into the government employment context was therefore unwarranted in that case. It is equally unwarranted in this case.

If this Court nevertheless remains concerned that the rule proposed by the undersigned would stifle legitimate citizen speech, this Court could still adopt that rule but add to it a "safe harbor" option akin to the one found in the rule suggested by Professor Kermit Roosevelt III in an article that sought to quell the lament in the world of academia and at the Plaintiff's bar over the decision in *Garcetti*:

> [T]he solution I prefer, the problem of the blurry line between speech as a citizen and speech as an employee could be solved by creating a safe harbor for employees who want to speak as citizens. Such a safe harbor could require that the employees speak to the public, do so outside the workplace, and make clear that they are not speaking for their employer. Speech in this safe harbor would, ideally, be protected not by the anemic *Connick-Pickering* balancing test but by something closer to the ordinary First Amendment analysis, with carveouts for speech that either demonstrably disrupts working relationships or suggests an unfitness for the job.
>
> This would be a space where we could approach true parity between government employees and ordinary citizens. This approach would use the First Amendment to protect speech that has First Amendment value. It would leave protection of other speech to devices that are

> tailored to the needs of the different circumstances in which it occurs.

Kermit Roosevelt III, *Not as Bad as You Think: Why* Garcetti v. Ceballos *Makes Sense*, 14 U. PA. J. CONST. L. 631, 659-60 (2012) (citations omitted).

B. Constitutionalizing the Employee Grievance As Petitioner Requests Would Engender Significant Legal Uncertainty for Government Employers and Lead to Suffocating Judicial Oversight.

As this Court explained in *Enquist*, "absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior." 553 U.S. at 600 (quoting *Connick*, 461 U.S. at 147). Accordingly, in that case the Court reasoned that "ratifying a class-of-one theory of equal protection in the context of public employment would impermissibly 'constitutionalize the employee grievance.'" *Id.* at 609 (quoting *Connick*, 461 U.S. at 154). The Court's reasoning was consistent with its prior determination that "[t]he federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies." *Id.* (quoting *Bishop v. Wood*, 426 U.S. 341, 350 (1976)).

Petitioner proposes a rule that truthful testimony related to matters of public concern that is not offered pursuant to the employee's official duties is protected by the First Amendment. According to Petitioner, "[i]n such cases, employers may impose discipline for the testimony only if they show that the testimony's

disruptive effects on the workplace outweigh the employee's interest in testifying, and society's interest in hearing the testimony." Pet. Br. at 8. Such a test would place an intolerable litigation burden on government employers and severely impact the proper and efficient function of those employers. Professor Roosevelt insightfully noted this difficulty:

> Generally speaking, our First Amendment doctrine is good at making the government keep its hands off. It is not good at supervising nuanced and context-sensitive judgments about the quality of speech or its social appropriateness; indeed, the Court's decisions repeatedly proclaim that the Amendment does not allow the government to make such judgments. But the government cannot be hands-off with its employees and agnostic as to the quality of their work product: employers must be able to evaluate employee job performance. *Garcetti's* carveout is sensible in terms of both First Amendment values and managerial efficiency.

Roosevelt, *supra* at 659 (citations omitted).

In addition to the inquiry of whether testimony can be considered part of the employee's official duties, Petitioner's rule would require searching inquiry of numerous questions. It would need to be determined: (1) whether the testimony at issue is even truthful testimony – an often subjective determination; (2) whether the matter testified to is an issue of public concern; (3) whether the testimony's disruptive effects outweigh the employee's interest in testifying; (4) whether the testimony's disruptive effects outweigh

society's interest in hearing the testimony; (5) what the employee's interest in testifying even is; and (6) what society's interest in hearing the testimony even is. These numerous and searching inquiries must all be considered, according to Petitioner's rule, prior to a government employer deciding whether to dismiss an employee. Furthermore, any one of these inquiries could generate or prolong significant litigation from a disgruntled employee.

Under such a system, federal courts would become super personnel boards charged with the unenviable task of sifting through numerous grievances to find any merit in the disputes before them. As constitutional causes of action, such grievances would be federalized, rigid, and unchangeable, and bring with them to federal court a myriad of attendant state law claims that do not belong there.

CONCLUSION

For the foregoing reasons and the reasons contained in Respondent Steve Franks' brief, the decision of the court below should be affirmed.

Respectfully submitted,

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Supreme Court of the United States

EDWARD LANE,
Petitioner,

v.

STEVE FRANKS, IN HIS INDIVIDUAL CAPACITY, AND SUSAN BURROW, IN HER OFFICIAL CAPACITY AS ACTING PRESIDENT OF CENTRAL ALABAMA COMMUNITY COLLEGE,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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Karl v. City of Mountlake Terrace, 678 F.3d 1062 (9th Cir. 2012)..... 16

Legal Servs. Corp. v. Velazquez, 531 U.S. 533 (2001) 25

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NAACP v. Button, 371 U.S. 415 (1963) 16

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OTHER MATERIALS

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Harry Kalven, Jr.:

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Public Employee Speech, Categorical Balancing, and § 1983: A Critique of Garcetti v. Ceballos, 42 U. RICH. L. REV. 561 (2007) 1, 4

Helen Norton, *Constraining Public Employee Speech: Government's Control of Its Workers' Speech to Protect Its Own Expression*, 59 DUKE L.J. 1 (2009) 21, 22

Paul M. Secunda:

Neoformalism and the Reemergence of the Right-Privilege Distinction in Public Employment Law, 48 SAN DIEGO L. REV. 907 (2011) 21, 22

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae respectfully submit this brief in support of Petitioner, Edward Lane, encouraging the reversal of the judgment of the Eleventh Circuit, because the judgment below is inconsistent with both the Court's general historical approach to public employee speech and the specific approach to such speech that the Court adopted in *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

Amici are law professors[2] who teach and write about the constitutional rights of public employees and have published a number of scholarly articles on these topics.[3] *Amici* have no financial stake in the outcome of this case, and in this brief do not ask the Court to reconsider *Garcetti*. But we are troubled by the tendency in some courts of appeals to misread this Court's decision in *Garcetti* to articulate ever-

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3(a), counsel for *amici* represent that all parties have consented to the filing of this brief by filing letters granting blanket consent to the filing of *amicus* briefs.

[2] A full list of the *Amici* appear in the Appendix to this brief. The names of educational institutions are provided for identification purposes only.

[3] A representative sample of *Amici* writings related to the issues before the Court include: Paul M. Secunda, *Whither the Pickering Rights of Federal Employees?*, 79 U. COLO. L. REV. 1101 (2008); Sheldon H. Nahmod, *Public Employee Speech, Categorical Balancing, and § 1983: A Critique of* Garcetti v. Ceballos, 42 U. RICH. L. REV. 561 (2007); and Scott R. Bauries & Patrick Schach, *Coloring Outside the Lines:* Garcetti v. Ceballos *in the Federal Appellate Courts*, 262 EDUC. L. REP. 357 (2011).

broadening readings of the narrow exemption from First Amendment protection the Court carved out. We file this brief to urge this Court to correct these rulings by clarifying the narrow nature of the exemption it recognized.

SUMMARY OF ARGUMENT

Garcetti v. Ceballos, 547 U.S. 410 (2006), excluded from the First Amendment's protections a very narrow category of public employee speech—speech *required* of the employee as a *contractual employment duty*. In this case, however, the Eleventh Circuit misread this very narrow exclusion to remove from the First Amendment's protections all public employee speech that *derives in any way* from the employee's work. Pet. App. 5a-7a. *Amici* urge the Court to reverse this erroneous construction of *Garcetti* and make clear that the First Amendment exemption recognized in *Garcetti* is an exceedingly narrow one.

Testimonial speech is quintessential "citizen speech" within the meaning of *Garcetti*. The duty of every citizen to respond to a subpoena with truthful testimony is unquestioned. In fact, as this Court has repeatedly recognized, it is the bedrock of our judicial system. Thus, it is beyond cavil that Petitioner's testimonial speech was speech as a citizen, rather than as an employee, and was therefore protected.

Further, the protection of public employees' testimonial speech preserves their role at the vanguard of the citizenry. Public employees have a uniquely valuable understanding of our public institutions, and they properly serve as the "eyes and ears" of the public in evaluating the performance of government institutions. Protecting public employees' testimonial speech from retaliation is therefore an essential condition for public accountability.

For all of these reasons, elaborated below, *Amici* urge the Court to reverse the Eleventh Circuit.

ARGUMENT

I. THE COURT SHOULD CLARIFY THE NARROW SCOPE OF THE FIRST AMENDMENT EXEMPTION IT CARVED OUT IN *GARCETTI*

This Court, beginning with *Pickering v. Board of Education of Township High School District 205*, 391 U.S. 563 (1968), has long recognized that a public employee's speech is protected as long as it addresses a matter of public concern, and as long as the employee's interests as a speaker and the public's interests as listeners are not outweighed by the government's interests in maintaining an effective and efficient workplace. *See id.* at 568; *Connick v. Myers*, 461 U.S. 138, 145-46 (1983); *Givhan v. Western Line Consol. Sch. Dist.*, 439 U.S. 410, 414 (1979); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977).

The Court's most recent decision in this line of precedent, *Garcetti v. Ceballos*, 547 U.S. 410 (2006), articulated a categorical exemption from these well-established First Amendment protections for public employees. Under *Garcetti*, "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Id.* at 421. Thus, public employee speech made "pursuant to . . . official duties" categorically does not qualify for First Amendment protection, regardless of any showing of public interest that an employee might make.

Garcetti thus recognized a narrow exception to this Court's longstanding rule that public employee speech merits robust First Amendment protection. Under *Garcetti*, a public employer may condition employment on the employee's relinquishment of the right to speak as the employee pleases *when speaking is part of the employee's job duties*, and the employee is *engaging in that job-required speech*; in other words, when the speech in question is the employee's *work product*. *Id.* at 421-22. Rather than requiring a balancing of interests, when an employee is hired by the government to engage in speech, the government's interest in controlling the content and viewpoint of that speech categorically outweighs any independent interest the employee may have in making the speech, or that the public might have in hearing it.[4]

Under a proper understanding of the *Pickering-Garcetti* line of precedent, Petitioner's testimonial speech was clearly subject to First Amendment protection. First, as Petitioner explains, his testimony under oath in response to a subpoena in a criminal trial is and long has been protected speech under the First Amendment. Pet. Br. 13-25. When a witness testifies under a subpoena, it is true that the witness's discretion to make expressive choices is necessarily cabined to an extent. The witness may not choose *not to answer* (other than to claim the protections of the Fifth Amendment against self-incrimination or to avoid waiving another privilege), lest he be held in contempt of court. The witness also may not choose to *lie*, for, if he so chooses, he may be

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[4] *See* Sheldon H. Nahmod, *Public Employee Speech, Categorical Balancing, and § 1983: A Critique of* Garcetti v. Ceballos, 42 U. RICH. L. REV. 561 (2007).

subject to a criminal charge for perjury. Importantly, though, neither of these restrictions derives from the First Amendment. Rather, the First Amendment *tolerates* these restrictions on the otherwise "uninhibited, robust, and wide-open"[5] right to speak—or not to speak—as one pleases because of the vital government interest in fair trials.[6] Nevertheless, any witness, even one compelled to testify by subpoena, has the inherent discretion to make numerous expressive choices in crafting his testimony. Even a speaker sitting in the witness chair at trial does not give up his expressive interests in choosing the words, facial expressions, and body language through which he will deliver his responsive and truthful testimony.

Bolstering these expressive interests that lie with the *witness* are the interests of the *public* in hearing evidence concerning those accused of wrongdoing. The Court has long held that free speech protections exist for the benefit of both *speakers* and *listeners* in the public debate. *See, e.g., Stanley v. Georgia*, 394 U.S. 557, 564 (1969) ("It is now well established that the Constitution protects the right to receive information and ideas."). Accordingly, removing testimonial speech from the First Amendment's scope—and therefore chilling witnesses from testifying—would inherently "'contract the spectrum of available knowledge'" on which the public can base its opinions.

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[5] *See New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) ("Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.").

[6] *Cf. Branzburg v. Hayes*, 408 U.S. 665 (1972) (declining to recognize a "reporter's privilege" not to testify regarding the identity of a source due to this vital interest).

Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 866-67 (1982) (plurality opinion) (quoting *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965)).

Here, the public's First Amendment interest in hearing what Petitioner witnessed was especially strong. Indeed, this case involved allegations of criminal fraud against a sitting Alabama state legislator; allowing the public to hear Petitioner's testimony, including the way in which he truthfully described the facts he witnessed, is of paramount consideration. The public's political decision-making depends on its ability to receive such information, and the First Amendment protects Petitioner's speech in part to serve this public interest. Thus, it is beyond cavil, and was when Respondent made the decision to terminate Petitioner, that Petitioner's responsive and truthful testimonial speech was protected speech.

The Eleventh Circuit reached the wrong result in this case when it held that Petitioner's testimony "owe[d] its existence to [his] professional responsibilities" because Petitioner's testimony "touched only on acts he performed as part of his official duties," and was therefore speech made "pursuant to his official duties" within the meaning of *Garcetti*. Pet. App. 4a, 5a, 7a (internal quotations omitted). In framing the inquiry in this way, the Eleventh Circuit misread the narrow exemption from First Amendment protection that the Court carved out.[7] Though the *Garcetti* exemption does not rely on the high-value/low-value

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[7] *See* Scott R. Bauries & Patrick Schach, *Coloring Outside the Lines:* Garcetti v. Ceballos *in the Federal Appellate Courts*, 262 EDUC. L. REP. 357 (2011) (describing the proper scope of the *Garcetti* rule).

distinction familiar to other categorical exemptions from the First Amendment's protections,[8] it is operationally similar to these other exemptions, in that it removes a category of speech from the First Amendment's protection and does not allow for any showing of interests to restore this protection. When this Court exempts a category of speech from otherwise applicable First Amendment protections, the lower courts have an important responsibility faithfully to apply the exemption, a duty that includes reading the exemption narrowly.[9] Indeed, the very definition of exempt categories of speech under the First Amendment presupposes the categories' narrowness.[10]

The *Garcetti* Court's repeated use of the phrase "pursuant to official duties" and its variants can be read in light of the facts before the Court, and this reading provides the only context necessary fully to understand the exemption's narrow scope. The facts the Court considered established that (1) a legal memorandum that Mr. Ceballos, a calendar deputy employed by the Los Angeles District Attorney's Office, drafted recommending dismissal of a pending

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[8] *See* Harry Kalven, Jr., *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1 (identifying the then-existing exemptions and terming the process of categorical exclusion the "two-level theory").

[9] *See, e.g.*, Nadine Strossen, United States v. Stevens: *Restricting Two Major Rationales for Content-Based Speech Restrictions*, 2010 CATO SUP. CT. REV. 67 (arguing that the rationales supporting the exemption for child pornography should be limited to the special case of that form of speech and its inherently criminal character).

[10] *See Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942) ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem.").

criminal case was the only speech at issue in the case, *Garcetti*, 547 U.S. at 415 ("[Mr. Ceballos] alleged petitioners violated the First and Fourteenth Amendments by retaliating against him based on his memo of March 2."); and (2) Mr. Ceballos drafted the memorandum pursuant to a specific job duty to draft legal memoranda, *id.* at 421 ("Ceballos does not dispute that he prepared the memorandum 'pursuant to his duties as a prosecutor'") (quoting Br. for Resp. at 4, *Garcetti v. Ceballos*, *supra*, No. 04-473 (U.S. filed July 22, 2005), 2005 WL 1801035).

Following a recitation of these facts, the Court clearly stated its holding: "We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Id.*

The Court stated that the locus or recipient of the speech is not a controlling or dispositive factor in the determination of whether the speech is protected. *Id.* at 420-21. For this proposition, the Court cited *Givhan v. Western Line Consolidated School District*. In *Givhan*, a public school employee complained internally to her supervisors about alleged race discrimination in personnel decision-making in her school. 439 U.S. at 412-13. Ms. Givhan made her statements about her own workplace, to her supervisors, and while she was in the course of her employment. Yet the Court unanimously held that her statements were protected. *Id.* at 413.

In deciding *Garcetti*, the Court explicitly relied on *Givhan*, distinguishing that case based on the facts—specifically, that Mr. Ceballos, unlike Ms. Givhan, had a *contractual duty* to make the speech for which

he was punished. *See Garcetti*, 547 U.S. at 421. When Mr. Ceballos spoke "pursuant to [his] official duties," *id.*, he spoke because his employment contract required him to speak. Thus, where the employee spoke, and to whom he spoke, has no bearing on the question whether he spoke "pursuant to . . . official duties."

Second, and more importantly to the instant appeal, the Court reaffirmed that whether a public employee's speech is related to the employee's job is also not a dispositive or controlling consideration in determining whether the speech is protected. *Id.* Quoting *Pickering*, the Court specifically noted the concern that would be presented if public employees were prevented from speaking about matters of which they have knowledge due to their employment:

> "Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal." The same is true of many other categories of public employees.

Id. (quoting *Pickering*, 391 U.S. at 572).

Thus, contrary to the holding of the Eleventh Circuit below, an employee does not speak "pursuant to his official duties" merely because he speaks about his job, matters he learned of at work, or topics that are pertinent to his job. In fact, public employees' unique knowledge of public policy matters relating to their employment is one of the principal justifications for *protecting* their speech. *See infra* Part III.

In the Court's words, "[t]he controlling factor in Ceballos' case is that his expressions were made pursuant to his duties as a calendar deputy," and "Ceballos drafted his disposition memo because that is part of what he, as a calendar deputy, was employed to do." *Garcetti*, 547 U.S. at 421. The Court cited this factor—that Ceballos drafted the memorandum as a requirement of his job—as the factor "distinguish[ing] Ceballos' case from those in which the First Amendment provides protection against discipline." *Id.* Thus, a simple and straightforward reading of *Garcetti* reveals that it creates a categorical exemption from First Amendment protection that applies *only* to speech *required* by a public employee's job duties.[11]

The *Garcetti* opinion justified the exemption of job-required speech from the First Amendment in several ways. One of these justifications—that the speech "owes its existence" to the employee's job responsibilities, *id.*—has been read completely out of context in the Eleventh Circuit, causing that court greatly to expand the scope of the *Garcetti* exemption, in direct conflict with the careful reasoning of the Court in drawing boundaries around its holding, as outlined above. The "owes its existence" dictum appears just after the Court articulates the holding establishing the categorical exemption. In full context, the Court states that "[t]he significant point is that the memo was written pursuant to Ceballos' official duties.

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[11] *See Garcetti*, 547 U.S. at 422 ("Refusing to recognize First Amendment claims based on government employees' work product does not prevent them from participating in public debate. The employees retain the prospect of constitutional protection for their contributions to the civic discourse. This prospect of protection, however, does not invest them with a right to perform their jobs however they see fit.").

Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created." *Id.* at 421-22.

Read in context, this "owes its existence" language is simply another way of stating that "speaking" by drafting a legal memorandum was what Ceballos was hired to do. Despite this obvious meaning, the court below read the language out of context as creating an additional "but for the employee's employment" test that swallows the *Garcetti* "pursuant to . . . official duties" test whole. The Eleventh Circuit thus erroneously stated: "Even if an employee was not required to make the speech as part of his official duties, he enjoys no First Amendment protection if the speech 'owes its existence to [the] employee's professional responsibilities.'" Pet. App. 5a (quoting *Abdur-Rahman v. Walker*, 567 F.3d 1278, 1283, 1286 (11th Cir. 2009)) (alteration in original)

But the *Garcetti* Court took great pains to distinguish Mr. Ceballos from Mr. Pickering, who spoke *about what he observed and learned at his workplace* and identified himself *as a teacher* in doing so, and Ms. Givhan, who spoke to her own supervisors *about what she observed at her workplace* and did so *while at work*. Neither of these employees could have prevailed if any speech they would not have made *but for* their employment were excluded from the First Amendment's protections. The sole fact distinguishing Mr. Ceballos from these other two defendants was that neither Mr. Pickering nor Ms. Givhan was *required by their employment contracts* to engage in the speech for which they were punished. Petitioner

was not required by his job duties to testify in court, so his speech is as protected as Ms. Givhan's and Mr. Pickering's.

The Eleventh Circuit held that Petitioner's speech was unprotected because he did not speak "primarily in [his] role as a citizen" and because his "testimony touched only on acts he performed as part of his official duties," and therefore "owe[d] its existence" to his employment. Pet. App. 5a, 7a-8a (internal quotations omitted; first alteration in original). *Amici* more fully address in the next section the notion of speaking "in one's role as a citizen," but, as the foregoing discussion illustrates, the Eleventh Circuit's ruling conflicts directly with the Court's decision in *Garcetti*, expanding the *Garcetti* exemption to encompass the very speech that the Court specifically and carefully excluded from it. *Amici* therefore urge this Court, at a minimum, to correct the Eleventh Circuit's erroneous interpretation of *Garcetti*'s clear and narrow exemption of work-*required* speech as a general exemption of all work-*related* speech from the First Amendment's protections.

II. THE TRUTHFUL TESTIMONY OF A WITNESS AT A GRAND JURY PROCEEDING, OR A CRIMINAL OR CIVIL TRIAL, IS CITIZEN SPEECH WITHIN THE MEANING OF *GARCETTI*

As argued above, Lane's testimony pursuant to subpoena at the federal criminal trial was citizen speech within the meaning of *Garcetti*. But this case presents an opportunity to provide clarity in this area in a manner consistent with the rationale of *Garcetti*. *Amici* propose the following rule: the truthful testimony of a witness at a grand jury proceeding,

or a criminal or civil trial, whether or not pursuant to subpoena, is citizen speech under *Garcetti*.[12]

At the outset, the truthful testimony of witnesses in criminal trials, grand jury proceedings, and civil trials is citizen speech because citizens traditionally have a civic obligation to assist in criminal and civil litigation. This Court has articulated this civic obligation on many occasions. In *Piemonte v. United States*, 367 U.S. 556 (1961), this Court observed: "Every citizen . . . owes to his society the duty of giving testimony to aid in the enforcement of the law." *Id.* at 559 n.2. To the same effect is *United States v. Calandra*, 414 U.S. 338 (1974), where this Court stated: "The duty to testify has long been recognized as a basic obligation that every citizen owes his Government." *Id.* at 345. Much earlier, this Court also declared: "It is . . . beyond controversy that one of the duties which the citizen owes to his government is to support the administration of justice by attending its courts and giving his testimony whenever he is properly summoned." *Blackmer v. United States*, 284 U.S. 421, 438 (1932).

Indeed, this obligation is so important to the administration of justice that this Court refused to recognize a privilege allowing newsmen to refuse to testify at grand jury proceedings and thereby avoid their obligation as citizens to "respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial." *Branzburg*, 408

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[12] *Amici* express no opinion on whether there may be circumstances where public employee testimony that is allegedly false should, like truthful testimony, be protected from employer discipline by the First Amendment unless it is knowingly or recklessly false. *See generally New York Times Co. v. Sullivan*, *supra*.

U.S. at 690-91. Even more dramatically, this Court held in *United States v. Nixon*, 418 U.S. 683 (1974), that the President's claim of executive privilege for confidential communications did not excuse him from his obligation to comply with a subpoena duces tecum.

In *Reilly v. City of Atlantic City*, 532 F.3d 216 (3d Cir. 2008), the Third Circuit observed: "The notion that all citizens owe an independent duty to society to testify in court proceedings is thus well-grounded in Supreme Court precedent." *Id.* at 229. It was for this reason that the Third Circuit ruled that the truthful testimony of a witness for the prosecution in a state criminal trial was citizen speech under *Garcetti*, even though the trial testimony arose out of the witness's official responsibilities as an employee. "That an employee's official responsibilities provided the initial impetus to appear in court is immaterial to his/her independent obligation as a citizen to testify truthfully." *Id.* at 231.

The Seventh Circuit reached a similar conclusion in *Morales v. Jones*, 494 F.3d 590 (7th Cir. 2007), where a police officer gave deposition testimony in another police officer's First Amendment retaliation case pursuant to 42 U.S.C. § 1983. Using what it called *Garcetti*'s practical approach, the Seventh Circuit found it irrelevant for citizen speech purposes that his deposition testimony was about his official duties. "Being deposed in a civil suit pursuant to a subpoena was unquestionably not one of Morales' job duties because it was not part of what he was employed to do." *Id.* at 598. The Seventh Circuit had previously stated: "Assistance to prisoners and their lawyers in litigation is not part of a [prison] guard's official duties." *Fairley v. Fermaint*, 482 F.3d

897, 902 (7th Cir. 2006) (Easterbrook, J.). Thus, the testimony that prison guards gave in inmates' suits was protected from employer discipline under *Garcetti*.

The historical understanding therefore supports the conclusion that the testimony of an employee who testifies truthfully in a criminal trial, grand jury proceeding, or civil trial is citizen speech.[13]

Characterizing such speech as citizen speech also promotes self-government, a central purpose of the First Amendment. *See* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948). As this Court declared in *New York Times Co. v. Sullivan*, "debate on public issues should be uninhibited, robust, and wide-open." 376 U.S. at 270. *See also* Harry Kalven, Jr., *The* New York Times *Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191. Criminal and civil trials directly advance this purpose because they involve the application and enforcement of legal principles established by democratically elected legislature to disputed facts. Such trials also involve the administration of justice in terms of promoting fairness and assuring that justice is done. In addition, criminal and civil trials are important components of self-government because citizens themselves directly participate. Society thus has a vital interest in hearing such speech.

Criminal trials and grand jury proceedings expressly implicate self-government because charges

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[13] Even truthful testimony in a torts or contracts case is citizen speech, we believe. Every citizen is potentially a plaintiff or a defendant in private civil litigation and has an obligation to promote fairness and justice by participating as a witness when called on to do so.

are brought and litigated by government prosecutors on behalf of the political community. Because of the importance of these proceedings in assuring fairness, discouraging perjury and bias, and providing community therapeutic value, this Court has held that the public has a First Amendment right to attend criminal trials. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980). But civil trials often implicate self-government directly as well. This Court's decision in *NAACP v. Button*, 371 U.S. 415 (1963), stated that, for the NAACP, litigation was a form of political expression related to combating racial discrimination. *Id.* at 429-30. This Court made the same observation regarding the ACLU in connection with its civil liberties litigation. *See In re Primus*, 436 U.S. 412, 428 (1978).

Actions under 42 U.S.C. § 1983 similarly implicate self-government. In such cases, the plaintiff claims that these defendants have violated his or her constitutional rights and seeks to hold them accountable. Indeed, several of the circuit court decisions ruling that truthful testimony is citizen speech within the meaning of *Garcetti* involve prior testimony in § 1983 litigation. *See Fairley v. Fermaint, supra*; *Morales v. Jones, supra*; *Karl v. City of Mountlake Terrace*, 678 F.3d 1062 (9th Cir. 2012). Moreover, this Court recently held that the Petition Clause protects the right of a public employee to sue his or her employer under § 1983 for retaliation in violation of the First Amendment where the subject of the lawsuit is a matter of public concern. *See Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488 (2011).[14]

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[14] The Tenth Circuit has gone even further, stating: "We write today to reaffirm that the constitutionally enumerated right of a private citizen to petition the government for the

In short, truthful testimony in criminal trials, grand jury proceedings, and civil trials directly promotes the self-government rationale of the First Amendment. Such testimony occurs in governmental proceedings and, whether the testimony is voluntary or subpoenaed, provides information that is useful to the political community.[15]

Amici further maintain that treating truthful witness testimony in criminal trials, grand jury proceedings, and civil trials as citizen speech encourages truthfulness and prevents the distortion of the truth-seeking function of the judicial process.

Protecting the integrity of the judicial process is the reason this Court has ruled that *witnesses* accused of perjury at criminal trials are absolutely immune from damages liability under § 1983. *See generally* SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983 §§ 7:40-7:41 (4th ed. 2013). In *Briscoe v. LaHue*, 460 U.S. 325 (1983), the plaintiffs sued police officers and a private party for allegedly testifying falsely at their respective criminal trials and thereby violating plaintiffs' rights to due process and to trial by an impartial jury. This Court held that all the defendants were protected by absolute witness immunity. It reasoned that, when § 1983 was enacted

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redress of grievances does not pick and choose its causes but extends to matters great and small, public and private." *Van Deelen v. Johnson*, 497 F.3d 1151, 1153 (10th Cir. 2007).

[15] Truthful testimony in criminal and civil trials also furthers the marketplace of ideas and truth-seeking rationale of the First Amendment by providing information of high value in judicial proceedings. *See Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting, joined by Brandeis, J.) ("the best test of truth is the power of the thought to get itself accepted in the competition of the market").

in 1871, the common-law background of absolute lay witness immunity was well-established. The underlying policy—the prevention of witness self-censorship so as to protect the judicial process—applied to witnesses who were targets of § 1983 litigation as well. Because witnesses, whether lay witnesses or police officers, play an important part in the judicial process, they, like judges, should be protected by absolute immunity. The Court concluded by applying a functional approach and emphasized the function of being a witness rather than the status of the witnesses as police officers.

This Court recently extended absolute witness immunity and the functional approach to all witnesses testifying before grand juries. In *Rehberg v. Paulk*, 132 S. Ct. 1497 (2012), the plaintiff sued the chief investigator in a district attorney's office under § 1983, accusing him of testifying falsely before three separate grand juries, each of which had separately indicted the plaintiff on various charges that were subsequently dismissed. This Court unanimously held that the defendant was protected by absolute witness immunity. The Court reasoned that the factors supporting absolute immunity at trials also applied to grand jury proceedings. In both situations, the concern was with depriving the tribunal of evidence because of fear of retaliatory litigation. In addition, absolute immunity made sense here because grand jury secrecy otherwise could be subverted.

Amici submit that the reasons for absolute witness immunity apply with equal if not greater force to truthful witness testimony at criminal trials, grand jury proceedings, and civil trials as citizen speech. The concern in witness immunity cases is the integrity of the judicial process, just as it is here. Potential

witnesses, whether public employees or not, should not be intimidated by the prospect of being sued in a separate lawsuit or, if they are public employees, by the prospect that they may lose their employment or otherwise be the subject of an adverse employment action. To paraphrase Justice Frankfurter in *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951), which applied absolute immunity to legislative acts such as holding hearings, we must not expect "uncommon courage" from citizens any more than we do from state legislators.

Amici's proposed rule is actually far more modest than the absolute witness immunity this Court has already recognized. Absolute immunity protects the witness from the need to defend even against the charge that he or she testified falsely.[16] In contrast, all that *Amici*'s proposed rule does is place *truthful* witness testimony at criminal trials, grand jury proceedings, and civil trials in the category of citizen speech. Subsequent First Amendment hurdles remain for such a plaintiff, including the public-concern inquiry, *Pickering* balancing, and causation-in-fact under *Mt. Healthy City School District Board of Education v. Doyle*, *supra*.

Finally, *Amici*'s proposed rule for citizen speech promotes the purposes of *Garcetti* by providing a clear standard to public employers and public employees. It will also minimize ad hoc judicial decision-making and reduce judicial intervention in employment disputes.

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[16] Thus, if Lane had been sued for damages under § 1983 by the state representative against whom he testified in the federal trials for allegedly testifying falsely, he would be protected by absolute witness immunity and would not even have to defend against this claim.

Under *Amici*'s proposed rule, public employers will know that the truthful testimony of their employees in criminal trials, grand jury proceedings, and civil trials is citizen speech under *Garcetti*. Such a rule avoids the uncertainty that this Court viewed as an impediment to public employers' managerial discretion. *See Garcetti*, 547 U.S. at 422-23. Similarly, it will provide guidance to public employees whose truthful testimony might otherwise be chilled by the threat of adverse employment consequences. In addition, federal and state courts will have a standard for implementing *Garcetti* in cases where such truthful testimony is the motivation for the alleged First Amendment violation.

In short, *Amici*'s proposed rule provides a clear standard consistent with *Garcetti*, the purposes of the First Amendment, this Court's approach to § 1983 witness immunity, and the integrity of the judicial process.

III. FIRST AMENDMENT PROTECTION FOR PUBLIC EMPLOYEE TESTIMONY PROMOTES GOVERNMENTAL ACCOUNTABILITY AND TRANSPARENCY, WHILE PROTECTING THE JUDICIAL FUNCTION FROM IMPAIRMENT

Robust First Amendment protection for sworn, truthful testimony also encourages public employees to testify, and to do so candidly. The rule that *Amici* propose in this brief—that truthful testimony of a witness at a criminal trial, grand jury proceeding, or civil trial is citizen speech under *Garcetti*—in turn promotes the public interest both in governmental transparency and in an unimpaired judicial system.

Public employees are at the "vanguard of the citizenry," as a class of persons best able to bring to

society's attention issues of government wrongdoing. *See* Paul M. Secunda, *Neoformalism and the Reemergence of the Right-Privilege Distinction in Public Employment Law*, 48 SAN DIEGO L. REV. 907, 911 (2011). Any rule that inhibits their testimony impairs that function, and thus risks permitting corruption to continue unchecked. Indeed, the Eleventh Circuit's rule—relying on an expansive notion of what it means for speech to "owe its existence" to the employee's professional responsibilities—conflicts directly with this "vanguard of the citizenry" principle: such a reading covers any speech that would not have happened but for the fact of public employment and necessarily closes the door to all whistleblower claims.

This expansive interpretation of *Garcetti* does nothing less than redefine this whole conception of what role public employees should play in ensuring the fair and efficient administration of government services. *See* Helen Norton, *Constraining Public Employee Speech: Government's Control of Its Workers' Speech to Protect Its Own Expression*, 59 DUKE L.J. 1, 4 (2009). Conscientious public servants who wish to speak out and testify truthfully in the best interests of society would be unable to do so without jeopardizing their careers. Instead, they would face the dilemma of choosing between honesty under oath and protecting their livelihoods. Some employees might choose not to testify and remain silent, or might claim to have forgotten key details.

Those results would harm not only employees' individual interests, but also society's interest in public accountability. Because public employees have unique insights about topics that relate to their employment, they are crucial voices in public debate

—especially in cases, like this one, involving public corruption. *See id.* (arguing that not permitting public employee speech that sheds light on government wrongdoing "frustrates a meaningful commitment to republican government because it allows government officials to punish, and thus deter, whistleblowing and other on-the-job speech that would otherwise inform voters' views and facilitate their ability to hold the government politically accountable for its choices").

Additionally, the unique role that public employees play in a representative democracy is dictated by the sheer size of American government. It is literally impossible for "ordinary citizens to keep track of all the myriad departments that make up federal, state, and local government" to ensure that they are functioning as they should. Secunda, 48 SAN DIEGO L. REV. at 949. This case is a prime example: ordinary citizens would have little ability to determine that Representative Schmitz was earning a substantial paycheck without reporting for work at the CITY program; only a government employee could have discovered her corruption.[17]

The Court embraced the idea of public employees as the vanguard of the citizenry in *Pickering*. In particular, in allowing the school teacher in *Pickering* to speak out on legitimate matters of public concern through an editorial to the local newspaper,

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[17] *See Andrew v. Clark*, 561 F.3d 261, 273 (4th Cir. 2009) (Wilkinson, J., concurring) ("[A]s the state grows more layered and impacts lives more profoundly, it seems inimical to First Amendment principles to treat too summarily those who bring, often at some personal risk, its operations into public view. It is vital to the health of our polity that the functioning of the ever more complex and powerful machinery of government not become democracy's dark lagoon.").

the Court observed that "[t]eachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal." 391 U.S. at 572. More recently in *City of San Diego v. Roe*, 543 U.S. 77 (2004) (per curiam), the Court reaffirmed "the right of employees to speak on matters of public concern, typically matters concerning government policies that are of interest to the public at large, *a subject on which public employees are uniquely qualified to comment.*" *Id.* at 80 (emphasis added); *see also Waters v. Churchill*, 511 U.S. 661, 674 (1994) (plurality opinion) ("Government employees are often in the best position to know what ails the agencies for which they work").

Consistent with good government, then, it is crucial that public employees act as the eyes and ears of the citizenry when it comes to governmental operations. Government employees are "uniquely qualified to comment" on such matters of public concern and raise alarms when something is amiss not only because of their physical proximity to the problem, but also because of their special expertise in dealing with the governmental issues that come to their attention. In the testimonial context, they also provide courts with information needed to protect us all from public corruption and other types of government wrongdoing.

That principle applies fully here. Mr. Lane protected his community from public corruption by giving to the court the necessary information it needed to convict Ms. Schmitz for her misconduct.

It does not stretch the imagination to see that the consequence of the Eleventh Circuit's cramped holding is to chill other conscientious public employees from undertaking necessary, and perhaps unpopular, actions in the face of allegations of misconduct. Without the ability of public servants to bring to light government's baser practices, all citizens suffer from the resulting lack of government transparency and accountability. Overturning the Eleventh Circuit's holding is essential to call public employees back to the vanguard to protect us all from government fraud, waste, and abuse.

Not only does deterring employees from testifying prevent them from exposing corruption, but it actually encourages corruption in the first instance. This is because the people who engage in corruption are often supervisors or others who are in positions of power. If these supervisors know that their employees will be scared to report them, even under subpoena, then it creates an incentive for them not only to threaten their employees with retaliation, but also to engage in additional corrupt acts. Of course, many public supervisors are dedicated public servants who would never do anything corrupt no matter what the law says about testimony. But for those who are inclined to cheat, the Eleventh Circuit's holding provides some solace.

In addition to the importance of providing protection to public employees at the vanguard of the citizenry, it is also crucial that public employees be able to speak freely and truthfully about government malfeasance so that the judicial process is not distorted. Distortion of the litigation process occurs when public employees do not feel free to testify in various legal proceedings for fear of losing their

jobs.[18] This Court expressed analogous concerns in *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001), where the Court struck down as violative of the First Amendment a federally imposed restriction prohibiting Legal Services Corporation ("LSC")-funded attorneys, as a condition of the receipt of federal funds, from challenging the legality or constitutionality of existing welfare laws.

According to this Court, the restriction addressed not the government's own speech (the viewpoint of which the government is free to control), but instead impermissibly regulated private speech on the basis of viewpoint. This was because the purpose of the LSC program was to facilitate private speech, rather than promote a governmental message. The Court determined that the federal restriction on LSC attorneys' legal arguments was tantamount to controlling the judicial system in a way that distorted it "by altering the traditional role of the attorneys . . . [to] present all the reasonable and well-grounded arguments necessary for proper resolution of the case." *Id.* at 544-45. This Court thus concluded that, "[b]y seeking to prohibit the analysis of certain legal issues and to truncate presentation to the courts, the enactment under review prohibits speech and expression upon which courts must depend for the proper exercise of the judicial power." *Id.* at 545.

No less than in *Velazquez*, "[t]he restriction imposed by the [lack of protection for public employee testimonial speech] threatens severe impairment of the judicial function." *Id.* at 546. Where public employees testify truthfully as citizens at criminal

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[18] The arguments made here concerning distortion of the litigation process are parallel and consistent with those contained in the discussion on witness immunity *supra* at Part II.

trials, grand jury proceedings, and civil trials, there is a serious risk of distortion of the legal process if they are fearful of the employment consequences of their testimony (which is clearly not government speech that "owes its existence" to the government employer). Such consequences tend to encourage lying or at least the shading of the truth. It is essential that the law instead provide these employees with a modicum of First Amendment free speech protection so that they may engage in "speech and expression upon which courts [may] depend for the proper exercise of the judicial power."

CONCLUSION

For the reasons set forth above, the judgment of the Eleventh Circuit should be reversed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

RECORD AND BRIEFS

No. 13-483

Supreme Court, U.S.
FILED
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In The
Supreme Court of the United States

EDWARD R. LANE,
Petitioner,

v.

STEVE FRANKS, in His Individual Capacity and SUSAN BURROW, in Her Official Capacity as Acting President of Central Alabama Community College,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF AMICUS CURIAE THE NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS IN SUPPORT OF PETITIONER

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Callahan v. Fermon,
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Carroll v. N.C.D.E.N.R,
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Chrzanowski v. Bianchi,
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Cohen v. Cowles Media Co.,
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Dahm v. Flynn,
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Durham v. Jones,
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Edwards v. City of Goldsboro,
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Fairley v. Fremont,
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Garcetti v. Ceballos,
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Garrity v. New Jersey,
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Green v. Barrett,
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Green v. Philadelphia Housing Authority,
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Houskins v. Sheahan,
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Howell v. Town of Carolina Beach,
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Jenkins v. Medford,
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Johnston v. Harris County,
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Kinney v. Weaver,
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Kirby v. Elizabeth City,
388 F.3d 440 (4th Cir. 2005) 13, 14, 17

Knight v. Vernon,
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Konraith v. Williquette,
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Lynch v. City,
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Martinez v. City of OPA-Locka,
971 F.2d 708 (11th Cir. 1992) 8

Melton v. City of Oklahoma City,
879 F.2d 706 (10th Cir. 1989),
928 F.2d 920 (10th Cir. 1991), *cert denied*,
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Miller v. Kennard,
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Morales v. Jones,
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Myers v. Nebraska,
324 F.3d 655 (8th Cir. 2003) 7

Newberne v. N.C. Department of Crime Control and N.C. Highway Patrol,
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Perry v. Sinderman,
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Piemonte v. United States,
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Pro v. Donatucci,
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Rankin v. McPherson,
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Robinson v. Balog,
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Schneider v. City of Denver,
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Scott v. Harris,
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Shehee v. City of Wilmington,
205 F. Supp. 2d 269 (D. Del. 2002),
aff'd in pertinent part,
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Tate v. Yenoir,
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Tindal v. Montgomery,
32 F.3d 1535 (11th Cir. 1994) 7, 9

United States v. Calendra,
414 U.S. 338 (1974) 5

Waters v. Churchill,
114 S. Ct. 1878 (1994) 18

Whalen v. Roanoke,
769 F.2d 221 (4th Cir. 1985), *aff'd*,
797 F.2d 170 (4th Cir. 1986) 7

Worrell v. Bedsole,
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CONSTITUTIONAL PROVISIONS

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U.S. CONST. amend. XIV 6

STATUTE

N.C. Gen. Stat. §§ 95-98 17

OTHER AUTHORITIES

Adelaida Jasperse, *Damned if you Do, Damned If You Don't: A Public Employee's Trilemma Regarding Truthful Testimony*, 33 W. New England L. Rev. 623 (2011) 16

Bopp & Schultz, *A Short History of American Law Enforcement* (1972) 3

Boward, *Lost Rights: The Destruction of American Liberty* (1995) 18

http://lawenforcementmuseum.org/TheMemorial/facts.htm 3

Lævinson, *Silencing Government Employee Whistleblowers In The Name of "Efficiency"*, 23 Ohio Northern U. L. Rev. 17 (1996) 19

Matt Wolf, *Does The First Amendment Protect Testimony By Public Employees*, 77 U. Chi. L. Rev. 1473 (2010) 13, 15-16

Public Employee Labor Relations In the Southeast - An Historical Perspective, 59 N.C.L. Rev. 71 (1980) 17

Senator Sam J. Ervin, Jr., *Preserving The Constitution* (1984) 18

The Impact Of Willowbrook On Equal Protection And Selective Enforcement, which appears in, *Section 1983 Litigation* (Practicing Law Institute; 2000; 641 PLI/LIT 469) 17

U.S. Department of Commerce Statistical Abstract of the United States, Table No. 500 (113 ed. 1993), http://ftp2census/gov/govs/apes/05fedfun.pdf 18

Uniform Crime Statistics in *www.fbi.gov/ucs/cius_04/law_enforcement_personnel* 3

I. INTEREST OF THE AMICUS CURIAE

The National Association of Police Organizations, Inc. ("NAPO") and its affiliate, the National Law Enforcement Officers' Rights Center of the Police Research and Education Project, are national non-profit organizations which represent law enforcement officers throughout the United States.

NAPO is a coalition of police associations and unions that seeks to protect the rights of law enforcement officers and to enhance public safety through legal advocacy, education and legislation. NAPO represents over 1,000 law enforcement organizations, with over 241,000 sworn law enforcement officers. NAPO often appears as amicus curiae in appellate cases of special importance to the law enforcement community. NAPO and the law enforcement profession have a vital interest in the issues before this Court. The adverse impact of the Eleventh Circuit decision below is greater on the police community because of the higher frequency that police officers testify as compared with other public employees. Law enforcement officers have a keen understanding of the needs of the judicial system.

NAPO submits this brief to assist this Court in its resolution of this enormously important case.[1]

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[1] The parties have consented to the filing of this amicus curiae brief. Letters of consent have been filed with the Clerk of Court. No party authored the brief in whole or in part, and made no monetary contribution to this brief.

II. SUMMARY OF ARGUMENT: TESTIMONY IS INHERENTLY PROTECTED BY THE FIRST AMENDMENT FROM GOVERNMENT RETALIATION

This case poses an issue of enormous constitutional importance to the American police community including the officers and their families:

> Does the First Amendment prohibit police and other governmental employers from retaliating with adverse actions against officers and employees because of their testimony?

This Court must send the message that retaliation against police officers because of their testimony is forbidden. If not, floodgates of greater retaliation will inflict grave harm on our nation's front line defenders, thus tampering with the operation of the rule of law.

At its core, this is a case about an abuse of government power because, *inter alia*, the conduct of Respondents and other public employers will likely have a sweeping impact – of muzzling robust testimony in the courts of America.

America's law enforcement community represents a large and unique class of public servants[2] who often suffer from retaliatory abuse by

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[2] Police officers are *sworn* officials, with duties as *witnesses*. Officers as witnesses may not show allegiance to their employers. In 2004, there were 14,254 police agencies, employing 675,734 sworn police officers and 294,854

their employers due to expression. Law enforcement officers *are often required* to testify in multiple forums. By its very nature, testimony is special and should be afforded the highest rung of First Amendment protection. A special rule of law to protect testimony should be enunciated by this Court. That rule need only be simple: testimony is constitutionally protected unless the testimony has been determined to be perjury by a court.

The protection of testimony must not depend upon idiosyncratic differences of the nuances of the particular testimony. Rather, testimony should be *per se* protected, *inter alia*, because of the massive impact of testimony on the accuracy of judicial decisionmaking throughout America. When a police officer testifies, he or she must be completely free to tell it like it is – without pressure or worry as to whether the police brass in management will be pleased or not. Retaliatory conduct which has the

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civilians, serving the 278 million persons in America. See Uniform Crime Statistics in *www.fbi.gov/ucs/cius_04/law_enforcement_personnel.* The American law enforcement profession is the most dangerous job for non-military workers. Officers constantly serve in environments where the risk of death and serious injury are prevalent. American policing has changed since its inception in Boston, Massachusetts in 1631. See Bopp & Schultz, *A Short History of American Law Enforcement* 17 (1972). Crime fighting has taken its toll on American police officers, who often develop illnesses and disabilities from their high stress profession, resulting in an average life span of only 57 years. Since 1792, when Deputy Sheriff Isaac Smith became the first police officer to die in service more than 17,900 police officers have been killed in the line of duty. See http://lawenforcementmuseum.org/TheMemorial/facts.htm More than 56,000 police officers are assaulted each year. *Id.*

effect of tinkering with testimony may lead to corruption. Permitting retaliation against officers because of their testimony will promote obstruction of justice.

Testimony should be pristine, and testifying officers must not be intimidated as witnesses by fear of having to appease police management or anyone else. Testimony is the engine that drives justice on a daily basis throughout America and should be held sacred.

III. TESTIMONY AS AN EXPRESSION IS PROTECTED BY THE FIRST AMENDMENT BECAUSE IT IS INHERENTLY A CITIZEN'S EXPRESSION

Law enforcement officers are frequently required to testify before all sorts of tribunals from local magistrates to federal trial courts. When called to testify, officers have no choice over the content of their testimony.

In *Connick v. Meyers*, 461 U.S. 138 (1983), this Court clarified the public concern test in public employee expression cases. That test should not be applicable in cases where the expression is testimony, as explained below, because expression is categorically unique and deserving of the highest rung of protection. Public concern analysis does not fit in testimony retaliation cases and its use potentially may result in allowing retaliation on an arbitrary unprincipled basis. In *Garcetti v. Ceballos*, 547 U.S. 410 (2006), this Court essentially precluded speech protection where the expression was

pursuant to "official duties" arising from one's particular job. Testimony is derivative of one's status as a witness which is predicated upon citizenship.

This Court has recognized broad immunities for testifying witnesses in both trials and grand juries, including for public employees. *Briscoe v. LaHue*, 460 U.S. 325, 333 (1983) ("'public policy . . . requires that the paths which lead to the ascertainment of truth should be left as free and unobstructed as possible,'"); *Rehberg v. Paulk*, 132 S. Ct. 1497, 1506 (2012). This protection for testimony is necessary to ensure that witnesses "testify fully and frankly," without fear of "retribution." *Douglas Oil Co. v. Petrol Stops*, 441 U.S. 211, 219 (1979).

The obligation to respond to a subpoena is "shared by *all citizens*" by virtue of their citizenship and not by virtue of their employment. *See Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991) (emphasis added); *see also United States v. Calendra*, 414 U.S. 338, 345 (1974) ("The duty to testify has long been recognized as a basic obligation that every citizen owes his Government."); *Piemonte v. United States*, 367 U.S. 556, 559 n.2 (1961).

Testimony, like other citizen speech, vindicates a core "First Amendment interest": "the public's interest in receiving the well-informed views of government employees." *Garcetti*, 547 U.S. at 419.

The reach of *Garcetti* in limiting protection for speech has been significant. E.g. *Houskins v. Sheahan*, 549 F.3d 480 (7th Cir. 2008) (complaint of assault not protected); *Callahan v. Fermon*, 526 F.3d 1040 (7th Cir. 2008) (complaint regarding police management misconduct not protected). *Garcetti* must not be read to permit government retaliation against testifying police officers based on the content of the testimony, which is the key component of the public concern test.

NAPO is concerned that an unintended result of *Garcetti* has been a decrease in complaints about police management corruption because of the elimination of speech protection. *Garcetti*, however, does not control the issue before the Court here because, *inter alia*, testimony is predicated upon the role as *witness* as opposed to employee. Officers testify because of their role as a *witness*. Absent perjury, there is no legitimate basis to punish any witness for carrying out the function of a witness.

IV. THIS COURT AND MANY LOWER COURTS SUPPORT FIRST AMENDMENT PROTECTION OF TESTIMONY FROM RETALIATION, ESPECIALLY FOR TESTIFYING POLICE OFFICERS

In *Perry v. Sinderman*, 408 U.S. 593, 598 (1972), over forty years ago, this Court held that retaliation against Professor Sinderman "based on his testimony before Texas legislative committees and his other public statements" was protected by the First and Fourteenth Amendments. Scores of recent

Circuit cases have followed the lead of *Perry* in protecting testimony in various contexts. E.g., *Chrzanowski v. Branchi*, 725 F.3d 734 (7th Cir. 2013); *Reilly v. City of Atlantic City*, 532 F.3d 216 (3d Cir. 2008); *Karl v. City of Mountlake Terrace*, 678 F.3d 1062 (9th Cir. 2012). These cases demonstrate, among other things, that public employers have become more brazen in their zeal to punish by retaliation when they learn of testimony that they do not like.

"The First Amendment protects the right to testify truthfully at trial." *Melton v. City of Oklahoma City*, 879 F.2d 706, 714 (10th Cir. 1989) (police officer testimony held protected), 928 F.2d 920 (10th Cir. 1991)(on rehearing, court addressed liberty but not expression claim), *cert denied*, 502 U.S. 906 (1991).

Numerous compelling cases support First Amendment protection for testimony[3] and many cases

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[3] *Chrzanowki v. Branchi*, 725 F.3d 734, 741 (7th Cir. 2013); *Reilly v. City of Atlantic City*, 532 F.3d 216 (3d Cir. 2008); *Morales v. Jones*, 494 F.3d 590 (7th Cir. 2007); *Fairley v. Fremont*, 482 F.3d 897 (7th Cir. 2007); *Whalen v. Roanoke*, 769 F.2d 221, 226-27 (4th Cir. 1985)(protecting testimony under the First Amendment), *aff'd*, 797 F.2d 170 (4th Cir. 1986)(en banc)(affirming on the basis of Judge Ervin's opinion). *Catletti v. Rampe*, 334 F.3d 225 (2d Cir. 2003) (police officer testimony protected by First Amendment); *Schneider v. City and County of Denver*, 2002 WL 1938583, 47 Fed. Appx. 517, 520 (10th Cir. 2002)(same); *Myers v. Nebraska*, 324 F.3d 655, 659 (8th Cir. 2003); *Kinney v. Weaver*, 301 F.3d 253 (5th Cir. 2002); *Green v. Philadelphia Housing Authority*, 105 F.3d 882, 887 (3d Cir. 1997); *Pro v. Donatucci*, 81 F.3d 1283 (3d Cir. 1996); *Tindal v. Montgomery*, 32 F.3d 1535 (11th Cir. 1994); *Reeves v. Claiborne County Bd. Of Ed.*, 828 F.2d 1096, 1100-01 (5th Cir. 1987); *Johnston v. Harris County*, 869 F.2d 1565, 1578 (5th Cir. 1989); *Melton v. City of Oklahoma City*, 879 F.2d 706, 714 (10th Cir.

that have addressed qualified immunity have held that protection for testimony is "clearly established." In *Catletti v. Rampe*, 334 F.3d 225 (2d Cir. 2003), a police officer was retaliated against for his testimony. Deputy Catletti testified on behalf of other employees who had been disciplined. Deputy Catletti had just earned high performance reviews – before the testimony against the police administration. The Second Circuit found the testimony protected under the First Amendment. The Court reasoned that "uninhibited testimony is vital to the success of ... truth seeking function." 334 F.3d at 230.

In *Schneider v. City of Denver*, 2002 WL 193 1938583, 47 Fed. Appx. 517, 520 (10th Cir. 2002), the Tenth Circuit held that a police officer's testimony was protected where he was retaliated against because he testified at a civil service personnel hearing. The case was on appeal from Officer Schneider's verdict because of a retaliatory transfer. Officer Schneider testified about one of the Police Department's training programs and testified against the department.

In *Kinney v. Weaver*, 301 F.3d 253 (5th Cir. 2002), police officers initiated First Amendment claims alleging retaliation because of their testimony. The Fifth Circuit held that the *officers' right not to be retaliated against for testifying was clearly established.* The Court explained:

1989); *Martinez v. City of OPA-Locka*, 971 F.2d 708 (11th Cir. 1992); *Robinson v. Balog*, 160 F.3d 183 (4th Cir. 1998); *Miller v. Kennard*, 74 F. Supp. 2d 1050 (D. Utah. 1999); *Freeman v. McKellar*, 795 F. Supp. 733, 739 (E.D. Pa. 1992); *Tate v. Yenoir*, 537 F. Supp. 306 (E.D. Mich. 1982).

> "There is no question Kinney's and Hall's testimony in the *Kerville* case is speech protected by the First Amendment. Testimony in judicial proceedings is inherently of public concern ... Moreover, the testimony at issue in the instant case is of public concern not only because of its context, but also because its subject matter - i.e., the use of excessive force by police officers."

In *Tindal v. Montgomery*, 32 F.3d 1535 (11th Cir. 1994), the Eleventh Circuit held that testimony was protected. Officer Tindal testified as a witness in a personnel trial regarding "the working environment in the Sheriff's office." *Id.* at 1537. Tindall's testimony was on behalf of a co-worker. *Id.* at 1541. The Court also denied qualified immunity because the constitutional right to testify without retaliation was clearly established, as other cases have held.

In *Miller v. Kennard*, 74 F. Supp. 2d 1050 (D. Utah. 1999), a police officer initiated a First Amendment claim alleging that he was retaliated against because of his testimony. The Court concluded that the testimony was protected and that it was clearly established that a police officer's testimony constituted protected speech; therefore the Court denied qualified immunity. In *Lynch v. City*, 166 F. Supp. 2d 224 (E.D. Pa. 2001), a police officer initiated a First Amendment challenge to punishment because of testimony. The Court

concluded that the officer's testimony constituted protected speech.

In *Dahm v. Flynn*, 60 F.3d 253 (7th Cir. 1994), the Court found that testimony before a legislative body regarding employee morale was protected. In *Shehee v. City of Wilmington*, 205 F. Supp. 2d 269 (D. Del. 2002), *aff'd in pertinent part*, 2003 WL 21061233 (3d Cir. 2003), the Court held that deposition testimony constituted protected expression. In *Tate v. Yenoir*, 537 F. Supp. 306 (E.D. Mich. 1982), the Court held that a law enforcement officer stated a First Amendment claim where he was punished as a result of his testimony and reasoned:

> "to hold otherwise would place a judicial imprimatur on the intolerable occurrence of allowing a witness' testimony to be compromised out of fear of what that witness' employer may think or do."

V. TESTIMONY NOT INVOLVING PERJURY SHOULD BE *PER SE* OR INHERENTLY PROTECTED

The First Amendment applies to all testimony. There are certain special features of testimony that militate against applying traditional public employee expression methodology in cases involving testimony. The traditional public concern test should be inapplicable in the unique *context* of testimony in a hearing. A witness cannot control

his/her speech. The better rule would be that testimony is inherently protected; otherwise public employee testimony will be subject to manipulation by abusive employers.

This Court has protected officer expression in much less compelling situations. See *Rankin v. McPherson*, 483 U.S. 378 (1987), where this Court held that a comment on the attempted assassination of President Reagan was protected. In contrast here, testimony by police officers throughout America impacts the routine core of the administration of criminal justice.

In *Pro v. Donatucci*, 81 F.3d 1283 (3d Cir. 1996), the Court recognized First Amendment protection for an employee's testimony. The Court reasoned that testimony before an adjudicatory body is *inherently* protected by the First Amendment. The Court explained:

> "A public employee's truthful testimony receives constitutional protection regardless of its content..." *Reeves v. Claiborne County Bd. Of Ed.*, 828 F.2d 1096, 1100-01 (5th Cir. 1987); *Johnston v. Harris County*, 869 F.2d 1565, 1578 (5th Cir. 1989); *Freeman v. McKellar*, 795 F. Supp. 733, 739 (E.D. Pa. 1992) ("a public employee's sworn testimony before an adjudicatory body has been held to be inherently a matter of public

> concern and protected by the First Amendment.")

In *Green v. Philadelphia*, 105 F.3d 882, 887 (3d Cir. 1997), the Third Circuit explained that:

> "When an employee testifies before an official government adjudicatory or fact-finding body he speaks in a context that is inherently a public concern. Our judicial system is designed to resolve disputes, to right wrongs. We encourage uninhibited testimony, under penalty of perjury, in an attempt to arrive at the truth. It would compromise the integrity of the judicial process if we tolerated state retaliation for testimony which is damaging to the state... the utility of inhibited testimony and the integrity of the judicial process would be damaged if were to permit unchecked retaliation for appearance and truthful testimony at such proceedings. Not only would the First Amendment right of the witness be infringed by this type of coercion, the judicial interest in attempting to resolve disputes would be in jeopardy..." 105 F.3d at 887.

Green's reasoning, and that of the plethora of other similar cases cited herein, provides a compelling foundation of rationale for this Court to articulate a bright line of protection for testimony.

The First Amendment applies to all testimony except for perjury.

A number of compelling cases demonstrate the better principle of *per se* or inherent protection for testimony. In *Chrzanowski v. Bianchi*, 725 F.3d 734, 741 (7th Cir. 2013) (*per se* rule that "[w]hen a public employee gives testimony pursuant to a subpoena . . . he speaks 'as a citizen' for First Amendment purposes.") The Third Circuit also recognized the *per se* approach of protecting testimony. *Reilly v. City of Atlantic City*, 532 F.3d 216, 231 (3d Cir. 2008); See *Johnston v. Harris County*, 869 F.2d 1565, 1578 (5th Cir. 1989)(all testimony on a matter of public concern should be protected). See Matt Wolfe, *Does the First Amendment Protect Testimony By Public Employees*, 77 U. Chi. L. Rev. 1473, 1482-90 (2010).

VI. THE PUBLIC CONCERN TEST IN PUBLIC EMPLOYMENT CASES SHOULD BE INAPPLICABLE IN CASES INVOLVING TESTIMONY

The public concern test should be limited to instances where the speaking employee can determine the content of the speech. Testimony must be protected from retaliation regardless of the content. *Kirby v. Elizabeth City*, 388 F.3d 440 (4th Cir. 2005) is a horror story which demonstrates the dangers of applying a public concern test to testimony. *Kirby* was an enormously important case involving testimony by Sergeant Kirby about the condition of a police car. The condition of police

vehicles is of utmost importance in promoting and protecting officer safety.

In *Kirby*, the Fourth Circuit held that Kirby's testimony about malfunctioning police equipment was unprotected. The Chief of Police became angry when he heard the testimony and punished Kirby. The *Kirby* holding exposed the Fourth Circuit police community to greater safety hazards as the affirmed discipline of *Kirby* because of his testimony sent the message loud and clear: officers can be disciplined for testimony about malfunctioning police equipment. This principle is repugnant to the critical needs of officer safety, and should be overruled.

The application of *Kirby* in the Fourth Circuit has wreaked havoc on the police community as it has opened the door for police management hyper-scrutiny of officer testimony, often followed by the whip of retaliatory discipline. Retaliation is often carried out in police agencies in subtle and hard-to-prove ways. Testimony is a highly dangerous area for the games of retaliation. A *per se* rule against retaliation for testimony is consistent with the core of the First Amendment and sends the right message for the preservation of integrity.

This Court has long recognized the unique and especially dangerous working environment of police officers. E.g. *Scott v. Harris*, 550 U.S. 372 (2007). Police split second decisionmaking is radically different than ordinary work related decisionmaking by other public employees. The failure to afford constitutional protection for

testimony will enhance safety hazards for the police community because officers will be less likely to disclose or testify about safety hazards. Officers will be reluctant to testify in ways that criticize management for creating or condoning safety hazards that impact the front line patrol officers. This Court has recognized the "weighty interest in officer safety ..." E.g., *Arizona v. Johnson*, 500 U.S. 323, 324, 129 S. Ct. 781, 782 (2009).

Courts should not tinker with determining whether testimony is of public concern or not. Rather, all testimony except that determined to be perjury by a criminal court should be off limits for government retaliation. The sacred bond between a testifying officer and his/her oath should be protected by this Court with a *per se* prohibition of retaliation.

VII. THE FIRST AMENDMENT PROTECTION FROM RETALIATION BECAUSE OF TESTIMONY PROMOTES IMPORTANT CONSTITUTIONAL VALUES, AND ENHANCES THE INTEGRITY OF THE AMERICAN CRIMINAL JUSTICE SYSTEM

The Eleventh Circuit's decision effectively renders public employees and police officers subject to discipline and termination if management disagrees with the officer's testimony. Many courts and commentators have examined this issue and most have demonstrated the critical necessity of protecting testimony by the First Amendment. E.g. Matt Wolf, *Does The First Amendment Protect Testimony By Public Employees*, 77 U. Chi. L. Rev.

1473 (2010); Adelaida Jasperse, *Damned if you Do, Damned If You Don't: A Public Employee's Trilemma Regarding Truthful Testimony*, 33 W. New England L. Rev. 623 (2011).

Permitting retaliation against witnesses is especially harmful in police agencies. E.g., *Green v. Barrett*, 226 Fed. Appx. 883 (11th Cir. 2007) (jailer fired for testifying that jail was unsafe). Officers often have to beg to obtain minimum necessary police resources such as functioning vehicles, bullet proof vests, working radios and weapons – to protect their own safety while doing their jobs. See *Worrell v. Bedsole*, 1997 WL 153830 (4th Cir. 1997) (Deputy fired for pleading for police equipment); *Howell v. Town of Carolina Beach*, 419 S.E.2d 277 (1992) (officer fired for reporting malfunctioning police firearms).

VIII. LAW ENFORCEMENT OFFICERS HAVE HISTORICALLY BEEN SUBJECTED TO MORE ABUSIVE RETALIATORY TREATMENT IN EMPLOYMENT, AND THE FIRST AMENDMENT HAS BEEN THE ESSENTIAL SOURCE OF OFFICER PROTECTION FROM RETALIATION

With only a limited patchwork of some statutory protections for officers in some jurisdictions, the First Amendment remains as the essential source of protection for all police officers who suffer job related retaliation for the exercise of free expression. In *Durham v. Jones*, 737 F.3d 291 (4th Cir. 2013) and *Bland v. Roberts*, 730 F.3d 368 (4th Cir. 2013), the Fourth Circuit recently addressed

representative First Amendment retaliation cases which illustrates the contemporary employment environments confronting police officers in the new millennium. *See also cases cited in note 3.* The officers in *Durham* and *Bland* were held to enjoy First Amendment protections.

Substantial parts of America, especially in the South, prohibit public sector collective bargaining by statute. See, e.g., N.C.G.S. §§ 95-98; *Public Employee Labor Relations In the Southeast - An Historical Perspective*, 59 N.C.L. Rev. 71 (1980). In North Carolina, for example, bargaining with law enforcement agencies as an organized unit is a class one misdemeanor. N.C.G.S. §§ 95-98, Many jurisdictions provide little or no protection from retaliation, leaving police officers with no significant means to protect their careers other than the First Amendment. For example, Sheriff Joe McQueen, has proclaimed that such employees "serve at the whim of the Sheriff." McQueen deposition at 442 in *Benson v. McQueen* (E.D.N.C.; 7:98-CV 164-DEN), quoted in *The Impact Of Willowbrook On Equal Protection And Selective Enforcement*, which appears in, *Section 1983 Litigation* (Practicing Law Institute; 2000; 641 PLI/LIT 469). Scores of cases demonstrate how police employers often make employment decisions based upon arbitrary, retaliatory and discriminatory considerations even including for testifying.[4]

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[4] E.g., *Green v. Barrett*, 226 Fed. Appx. 883 (11th Cir. 2007)(jailer fired for testifying that the jail was unsafe); *Kirby v. Elizabeth City*, 388 F.3d 440 (4th Cir. 2005)(officer disciplined for testifying about malfunctioning police equipment) *Cf. Edwards v. City of Goldsboro*, 178 F.3d 231 (4th Cir. 1999)(officer disciplined for teaching off-duty firearms safety

As government has grown, so has the abuse of power by government employers.[5] Americans from all walks of life rely on the Constitution for protection from arbitrary and oppressive government power.[6] Contemporary law enforcement bureaucracies afford vast opportunities for bureaucrats to employ abusive tactics that are retaliatory.[7] Retaliation by government agencies

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class); *Jenkins v. Medford*, 119 F.3d 1156 (4th Cir. en banc 1997; firing for political activities); *Worrell v. Bedsole*, 1997 WL 153830 (4th Cir. 1997)(deputy fired for reporting failures in providing safe police equipment); *Carroll v. N.C.D.E.N.R*, 358 N.C. 649, 599 S.E.2d 888 (2004)(officer disciplined for nominal speeding while responding to medical emergency); *Newberne v. N.C. Department of Crime Control and N.C. Highway Patrol*, 359 N.C. 782, 610 S.E.2d 201 (2005)(retaliation against Trooper); *Bulloch v. N.C. Highway Patrol*, 732 S.E.2d 373 (2012)(Trooper arbitrarily terminated without cause); *Howell v. Town of Carolina Beach*, 106 N.C. App. 410, 419 S.E.2d 277 (1992)(officer fired for reporting malfunctioning police firearms).

[5] Millions of individuals are employed by more than eighty two thousand governmental units at local, state, and federal levels. As of 1991, more than 18 million persons were employed by local, state or the federal government. See *Waters v. Churchill*, 114 S. Ct. 1878, 1899 n. 3 (1994)(Stevens, J. and Blackmun, J., dissenting)(citing the 1991 figures from the U.S. Department of Commerce Statistical Abstract of the United States, Table No. 500, page 318 (113 ed. 1993). The 2005 data indicate that there were 18,644,112 government employees that year. http://ftp2census/gov/govs/apes/05fedfun.pdf.

[6] See Senator Sam J. Ervin, Jr., *Preserving The Constitution* 165, 213 - 214 (1984); Boward, *Lost Rights: The Destruction of American Liberty* 1-6, 49-51 (1995).

[7] See *Board of County Commissioners v. Umbehr*, 518 U.S. 668 (1996)(cataloging cases of government retaliation in different contexts).

frequently arises in many different contexts.[8] For police officers, the First Amendment serves as the bedrock beacon of faith that inspires officers to carry out their street and testimonial missions with protection from retaliation.

Patrol commanders, sheriffs, police chiefs, government managers, inspectors and many local government officials are more prone to influence by direct political and other improper pressures, and therefore more likely to act with partisan or other retaliatory motives. *E.g. Bland v. Roberts*, 730 F.3d 368 (4th Cir. 2013)(denying summary judgment in political patronage case where deputy sheriffs were fired in retaliation for not politically supporting the Sheriff); *Durham v. Jones*, 737 F.3d 291 (4th Cir. 2013); *Knight v. Vernon*, 214 F.3d 544 (4th Cir. 2000); *Edwards v. City of Goldsboro*, 178 F.3d 231 (4th Cir. 1999) and cases cited herein.

This Court has held that law enforcement officers are not relegated to a "watered down version of constitutional rights." *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967). Lower courts have historically followed this Court's teachings that constitutional protections for America's law enforcement officers are entitled to great weight. See e.g. *Konraith v. Williquette*, 732 F. Supp. 973, 978 (W.D. Wis. 1990) (constitutional rights of law enforcement officers "must be afforded great weight"); *Edwards v. City of*

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8. See Levinson, *Silencing Government Employee Whistleblowers In The Name of "Efficiency"*, 23 Ohio Northern U. L. Rev. 17 (1996)(cataloging numerous cases demonstrating retaliation against police officers).

Goldsboro, 178 F.3d 231 (4th Cir. 1999); *Barrett v. Thomas*, 649 F.2d 1193 (5th Cir. 1981).

IX. CONCLUSION

WHEREFORE, this Court should reverse the Eleventh Circuit decision below, and hold that testimony is protected by the First Amendment.

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 13-483

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IN THE

Supreme Court of the United States

EDWARD LANE,

Petitioner,

v.

STEVE FRANKS, IN HIS INDIVIDUAL CAPACITY, AND SUSAN BURROW, IN HER OFFICIAL CAPACITY AS ACTING PRESIDENT OF CENTRAL ALABAMA COMMUNITY COLLEGE,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE NATIONAL EDUCATION ASSOCIATION, SERVICE EMPLOYEES INTERNATIONAL UNION, AND AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, AFL-CIO, AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

This brief *amici curiae* in support of Petitioner Edward Lane is submitted, with the consent of the parties,[1] on behalf of the National Education Association ("NEA"); Service Employees International Union ("SEIU"); and American Federation of State, County, and Municipal Employees, AFL-CIO ("AFSCME").

NEA is a nationwide employee organization with approximately three million members, the vast majority of whom serve as educators and education support professionals in our nation's public schools, colleges, and universities. As education professionals, NEA's members are deeply committed to ensuring that public school students, their teachers, and other education professionals have the freedom to speak openly about issues, especially controversial ones, and that their freedom to deliberate and engage over such topics is central to the education process. NEA and its members further believe that when public sector employees give sworn testimony, such testimony is necessarily a matter of public concern and may not be the basis for any adverse employment action against the employee.

SEIU is a labor organization that represents over two million men and women working in health care, property services, and public services throughout the United States. As reflected in its Mission Statement, SEIU is committed to building a civil society in which the voices of workers and their families are heard at every

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[1] Letters of consent are on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici curiae* made a monetary contribution to the preparation or submission of the brief.

level of government in support of economic opportunity and social justice.

AFSCME is a labor organization with 1.6 million members in hundreds of occupations who provide vital public services in 46 states, the District of Columbia, and Puerto Rico. AFSCME advocates for fairness in the workplace, excellence in public services, and prosperity and opportunity for all working families.

SUMMARY OF ARGUMENT

Individuals do not forfeit their First Amendment rights as a condition of accepting public employment. There are certain categories of low-value public-employee speech against which a government employer may take adverse action—such as where the speech does not involve matters of public concern or the speech is within the employer's legitimate proprietary control. Outside of those limited categories, however, the First Amendment generally requires that a court conduct a balancing inquiry that accounts both for the interests of the employee and the public in the speech at issue and for the government employer's ability to operate effectively.

Judged by those standards, a public employee's truthful sworn testimony will almost *always* merit protection against employer retaliation. That is because an employee's truthful testimony necessarily implicates public concerns, and a government employer has no legitimate reason for retaliating against an employee for such truthful testimony—even (unlike the case here) when such testimony can be characterized as part of a particular public employee's job duties.

The nature of the interests at stake therefore calls for a categorical rule prohibiting retaliation against truth-

ful testimony, rather than a case-by-case balancing. A rule that would leave public employees with any degree of uncertainty as to whether they can speak the truth under oath without fear of employer retaliation is insufficient to protect the important First Amendment interests involved; public employees should be free of the apprehension of potential disciplinary action that could result in something less than the full and truthful disclosure of facts that sworn testimony is meant to elicit. And because public employees may be called upon to testify in such a great variety of contexts and different proceedings, a rule that fails to adequately protect them against employer retaliation could greatly impair the integrity and functioning of government processes.

Where the interests of employees and the public at large weigh so obviously in favor of protecting the exercise of First Amendment rights, this Court has not hesitated to create rules that provide broad protection. Therefore, this Court should hold without reservation that truthful testimony by public employees enjoys First Amendment protection against employer retaliation.

ARGUMENT

THE FIRST AMENDMENT PREVENTS A GOVERNMENT EMPLOYER FROM RETALIATING AGAINST A PUBLIC EMPLOYEE FOR PROVIDING TRUTHFUL SWORN TESTIMONY.

Government employees are not obliged, simply by virtue of having entered public service, to completely relinquish their First Amendment rights. *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 465 (1995); *see also City of San Diego v. Roe*, 543 U.S. 77, 80 (2004) (per curiam); *Pickering v. Bd. of Educ.*, 391

U.S. 563, 568 (1968). This Court long ago rejected the "dogma . . . that a public employee had no right to object to conditions placed upon the terms of employment—including those which restricted the exercise of constitutional rights." *Connick v. Myers*, 461 U.S. 138, 143 (1983). It recognized instead that "[t]here are some rights and freedoms so fundamental to liberty that they cannot be bargained away in a contract for public employment." *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2493 (2011).

To be sure, certain speech by public employees can be curtailed on the premise that "[g]overnment employers, like private employers, need a significant degree of control over their employees' words and actions" in order to secure "the efficient provision of public services." *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006). Yet even then, it would be inaccurate to suggest that such employee speech "is totally beyond the protection of the First Amendment." *Connick*, 461 U.S. at 147. For example, there is no suggestion that the government could jail or fine the Petitioner for providing the truthful testimony at issue here. *See generally Brandenburg v. Ohio*, 395 U.S. 444 (1969).

The question in a case such as this, then, is whether the speech at issue, albeit entitled to some level of protection under the First Amendment, falls into an area that gives the public employer the categorical prerogative to discharge, discipline, or take other adverse action against the employee in retaliation for the speech. *See, e.g., Roe*, 543 U.S. at 84; *Garcetti*, 547 U.S. at 421. If no categorical limitation on the speech applies, then at the very least a court must conduct a balancing of interests that accounts for the interests of the employee in the speech, the value of the speech, and the effect, if

any, of the speech on the government employer's ability to operate efficiently and effectively. *See Pickering*, 391 U.S. at 568.

This Court has recognized two circumstances in which a public employee's otherwise protected speech may be categorically restricted. First, where employee speech involves no matter of public concern—such as personal gripes about internal office matters—the government employer may take action without conducting the balancing normally required under *Pickering*. *See Roe*, 543 U.S. at 84; *Connick*, 461 U.S. at 143. Second, because government employers need "a significant degree of control over their employees' words and actions," they may restrict employees' speech made "pursuant to their official duties." *Garcetti*, 547 U.S. at 418, 421.

The Petitioner's brief demonstrates that Lane's truthful sworn testimony in a grand jury proceeding and criminal trial does not fit within either of these categorical exclusions from *Pickering*'s balancing test and that, when *Pickering* balancing is properly applied, Lane's speech undoubtedly deserves protection from employer sanction. *See* Br. of Pet. Lane at 17-25.

But we would go further than that. The nature of the interests at stake is such that the balance will almost *always* call for protecting truthful testimony against employer retaliation. On the one hand, testimony, by furthering the search for the truth, inherently implicates public concerns; on the other, as a rule a government employer can have no legitimate, efficiency-based reason for retaliating against an employee for such truthful testimony. Consequently, the protection of truthful testimony should not depend on a case-by-case

balancing of interests. Rather, even where—unlike in this case—sworn testimony can be characterized as part of a particular public employee's job duties, the public interests that are served by ensuring public employees that their truthful testimony cannot cost them their jobs call for a categorical rule against employer retaliation.[2]

A. A Public Employee's Truthful Sworn Testimony Necessarily Involves a Matter of Public Concern.

There can be no question that, as a general matter, sworn testimony enjoys protection under the First Amendment. *See Butterworth v. Smith*, 494 U.S. 624, 633-34 (1990); *cf. also Perry v. Sindermann*, 408 U.S. 593, 598 (1972) (noting that the plaintiff's protected speech consisted, in part, of sworn testimony before legislative committees). When a public employee provides such testimony truthfully, that speech act necessarily involves a matter of public concern, such that under *Connick* and its progeny, public employers cannot be given free rein to retaliate against an employee for having told the truth under oath.

In *Connick* and the subsequent cases in which this Court has developed the concept of speech on matters

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[2] We focus our discussion on cases where an employer retaliates against the giving of truthful testimony because the employer would prefer that the truth not be known. That is what is alleged here and in most public employee First Amendment retaliation cases. This is not to suggest that only testimony that is found to have been fully accurate is entitled to protection against adverse employment actions. Cases where the factual accuracy of testimony is disputed may require a more complex analysis.

of "public concern," the circumstances in which a government employer is free to retaliate against employee speech have been carefully defined in terms that clearly do *not* apply to truthful sworn testimony. In *Connick*, an assistant district attorney, dissatisfied with her supervisor's decision to transfer her to another division, circulated an intra-office questionnaire that solicited her colleagues' views on a variety of workplace issues, including the transfer policy, office morale, and the level of confidence in the office's supervisors. *See* 461 U.S. at 141. With the exception of a question that asked whether others felt pressure to work in political campaigns, this Court found that the questionnaire touched only on internal workplace grievances, not on matters of public concern. Accordingly, the Court held that no *Pickering* balancing was required, as such case-by-case scrutiny would ignore the "common-sense realization that government offices could not function if every employment decision became a constitutional matter." *Id.* at 143.

Next, in *Roe*, this Court addressed a First Amendment claim by a police officer who was fired for off-duty activity that included displaying and selling videos on the internet showing him stripping off a police uniform and engaging in sexual activity. On those facts, the Court had "no difficulty in concluding that Roe's expression does not qualify as a matter of public concern under any view of the public concern test." 543 U.S. at 84.

The public-concern test articulated in *Connick* and applied in *Roe* is aimed at ensuring that the functioning of government offices is not inhibited by speech that holds little value to the public at large. *See Snyder v. Phelps*, 131 S. Ct. 1207, 1215 (2011) (*Connick* recog-

nized that "restricting speech on purely private matters does not implicate the same constitutional concerns as limiting speech on matters of public interest," and therefore the "First Amendment protections [of purely private speech] are often less rigorous."). In *Connick*, that concern focused on how granting protection to the airing of workaday office grievances—speech that conveys no important information to the public—would effectively "require a public office to be run as a roundtable for employee complaints over internal office affairs." 461 U.S. at 149. And in *Roe*, the Court emphasized the government employer's legitimate interest in restricting low-value speech about non-work concerns, such as Roe's homemade pornography, that might be "detrimental to the mission and functions of the employer." 543 U.S. at 84.

None of those concerns is present when the speech at issue is truthful sworn testimony. Such speech is not a matter of private or trivial concern because, as this Court has noted, it is furnished for the purpose of influencing "official governmental action, action that often affects the rights and liberties of others." *United States v. Alvarez*, 132 S. Ct. 2537, 2546 (2012). As such, testimony necessarily implicates public concern with respect to the proper functioning of the government's truth-seeking processes. "[T]he means used to achieve justice must have the support derived from public acceptance of both the process and its results," *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 571 (1980) (plurality opinion), and "[t]he very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts," *United States v. Nixon*, 418 U.S. 683, 709 (1974). If public employees could testify candidly only at the risk of losing their

jobs, the public could hardly have faith that a proceeding would produce "full disclosure of all the facts." *Id.*

What is at risk here is not only public trust in the process by which the government enforces the law, but the integrity of the process itself. A "fundamental goal of our legal system" is "arriving at the truth." *United States v. Havens*, 446 U.S. 620, 626 (1980). Without full and truthful testimony, the courts lack one of the necessary elements for "proper exercise of the judicial power." *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 545 (2001); *see also Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 889 (2009) (emphasizing the "vital state interest" in "maintain[ing] the integrity of the judiciary and the rule of law").[3]

Given the public importance of providing truthful sworn testimony—both to the particular proceeding in which the testimony is offered, and to the administration of justice writ large—it is safe to say that, absent extraordinary circumstances, such speech should always qualify as a matter of public concern. This speech is of obvious "concern to the community," *Connick*, 461 U.S. at 146, on a "subject of general interest and of value and concern to the public," *Snyder*, 131 S. Ct. at 1216 (quoting *Roe*, 543 U.S. at 83-84).

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[3] The public interest in truthful sworn testimony is not confined to judicial proceedings, but extends to other proceedings in which sworn testimony is given, such as administrative hearings, arbitrations, and certain legislative hearings. *See, e.g., Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 85 (2002) ("[A] fair and expeditious resolution of the underlying controversy [is] a goal of arbitration systems and judicial systems alike"). In all of these proceedings, truthful sworn testimony is an essential part of the process by which the government seeks to secure a fair resolution of matters presented for decision.

Respondent Burrow acknowledges that Lane's testimony in the corruption case involved a matter of public concern, *see* Br. of Resp. Burrow at 19-21, but argues that this Court should decline to adopt a categorical rule that all truthful testimony by a government employee qualifies for the same treatment, *see id.* at 25-27. In particular, Burrow contends that some employee testimony might not warrant protection against employer retaliation because it could involve "opinions," "speculat[ion]," and "testi[mony] about extraneous matters," or might "otherwise exceed the scope of the societal expectation that [employees should] merely testify truthfully." *Id.* at 25. Burrow also argues that a bright-line rule is inconsistent with this Court's holding in *Borough of Duryea* that the Petition Clause does not prohibit the firing of a government employee based on a lawsuit against his employer that does not involve a matter of "public concern." 131 S. Ct. at 2497.

Burrow is wrong on both counts. First, proceedings in which testimony is taken under oath are not unrestricted platforms on which a witness may express any view on any subject she wishes. In a trial, for example, testimony consists of answers made in response to specific questions, and its relevance is subject to judicial oversight. *See* Fed. R. Evid. 401, 402 & 403. Similar constraints apply in other proceedings where testimony is taken under oath. Thus, the concern that a government employee will use the occasion of her testimony to launch irrelevant personal attacks against others, *see* Br. of Resp. Burrow at 19-21, is fanciful.

Second, this Court's holding in *Borough of Duryea* has no bearing on whether sworn testimony in a government proceeding qualifies as a matter of public con-

cern. An employee is under no legal or societal obligation to file a grievance or petition, and an employee's decision to take such action does not, standing alone, implicate the broader public concern in the truth-seeking function that is implicated by proceedings in which testimony is taken under oath. Furthermore, the fact that testimony has been deemed relevant in such a proceeding gives the speech an importance—as determined by an impartial tribunal—that does not inhere in every grievance or petition that any individual may choose to pursue. There consequently are good reasons for extending broader protection to testimony than to petitions.

B. This Court's Decision in *Garcetti* Does Not License a Government Employer to Retaliate Against Public Employees for Giving Truthful Testimony.

Nor does the Court's decision in *Garcetti* categorically strip a public employee's sworn testimony from protection against employer retaliation. In cases, such as this one, where providing testimony is not within the employee's job duties, *Garcetti* is wholly inapplicable. And even where a public employee's job duties do include giving testimony, *Garcetti*'s underlying rationale does not allow a government employer to retaliate against the employee for having told the truth in her testimony.

1. *Garcetti* is plainly inapplicable where, as here, giving sworn testimony is not part of a public employee's job duties.

At the outset, the decision below thoroughly botches the relevant inquiry under *Garcetti* by focusing nar-

rowly on whether the subject matter of Lane's testimony "owe[d] its existence" to Lane's job, Pet. App. 5a, and concluding that Lane was subject to discharge because his testimony "touched only on acts he performed as part of his official duties," *id.* at 7a. The Eleventh Circuit's error arises from its attempt to dissect an isolated "sentence[] of the United States Reports as though [it] were the United States Code." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993).

To be sure, the "owes its existence" formulation is drawn from language in *Garcetti*. 547 U.S. 421-22. But that passage does not mean—as the Eleventh Circuit appeared to assume—that a government employer can restrict its employees' speech on a matter of public concern whenever the speech deals with facts learned by virtue of the employment. That is evident from the fact that the *Garcetti* Court "acknowledged the importance of promoting the public's interest in receiving the well-informed views of government employees," and noted that speech by public employees—who are "the members of a community most likely to have informed and definite opinions" about the operation of government services—is crucial "for informed, vibrant dialogue in a democratic society." *Id.* at 419 (citations and quotation marks omitted).

As this Court put it in *Roe*:

> Were [public employees] not able to speak on [the operation of their employers], the community would be deprived of informed opinions on important public issues. The interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it.

543 U.S. at 82 (citation omitted).

The Eleventh Circuit's misguided reading of *Garcetti* must therefore be rejected. Where, as here, giving sworn testimony is not part of an employee's job duties, and the only connection between the testimony and a government job is that the facts described in the testimony were learned on the job, *Garcetti* is simply inapplicable and does not permit the employer to take adverse action.[4] *Garcetti* protects a government employer's legitimate interest in directing and controlling the performance of an employee's job—whether the job performance consists of conduct or of speech—but *Garcetti* in no way grants government employers *carte blanche* to direct or control *everything an employee may say* about what happens in the workplace. This point is so obvious, in fact, that Respondent Burrow concedes it and asks that the judgment below be reversed on this basis. *See* Br. of Resp. Burrow at 16-21.

2. Even where a public employee's job duties include giving testimony, *Garcetti* does not allow a government employer to retaliate against the employee for giving truthful testimony.

Even in circumstances where a public employee's job duties *do* include providing sworn testimony, *Garcetti* should not be read to license the employer to

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[4] Because *Garcetti* is so plainly inapplicable to Lane's circumstances, we agree with Petitioner's submission that Respondent Franks is not entitled to qualified immunity. *See* Br. of Pet. Lane at 34-45. Lane's First Amendment right to be free of employer retaliation was clearly established at the time of the offending conduct.

discharge or discipline an employee in retaliation for providing that testimony.

Garcetti's holding concerning speech made "pursuant to" a public employee's professional duties derives from the need for government employers to retain "control over what the employer itself has commissioned or created." 547 U.S. at 421-22. This Court reasoned that, if a government employer were not permitted to exercise "a significant degree of control over [its] employees' words and actions . . . , there would be little chance for the efficient provision of public services." *Id.* at 418. Thus, for speech to be categorically unprotected against employer sanction under *Garcetti*, it must be speech that the government employer has a legitimate proprietary interest in directing or controlling.[5]

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[5] This Court has referred to the kind of speech that cannot be restricted under *Garcetti* as "citizen" speech. *See, e.g.*, *Borough of Duryea*, 131 S. Ct. at 2493-94. But as we have observed, the distinction between purely private speech and speech on a matter of public concern rests on the different *interests* that are implicated by these two classes of speech. *See supra* at 6-11. The concept of "citizen" speech may serve as a useful shorthand for the kinds of interests that are implicated by speech on a matter of public concern, but it would be a mistake to view the protection of employee speech as dependent on a determination that an individual was acting in the *status* of a citizen. After all, the First Amendment does not protect speech on matters of public concern only when it comes from citizens. *See, e.g.*, *Citizens United v. FEC*, 558 U.S. 310, 343 (2010) ("The Court has thus rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not 'natural persons.'"). This Court has acknowledged that the government may not retaliate against corporations or other non-citizens who contract with the government

A public employee's truthful testimony does not, however, implicate the proprietary and efficiency-related concerns that warrant treating some forms of employee expression as unprotected against employer retaliation. This Court has repeatedly emphasized that providing lawful testimony is a *civic* duty, independent of any job duty. *See, e.g., Blair v. United States*, 250 U.S. 273, 281 (1919) (declaring that "the giving of testimony and the attendance upon court or grand jury in order to testify are public duties which every person within the jurisdiction of the government is bound to perform upon being properly summoned"); *Blackmer v. United States*, 284 U.S. 421, 438 (1932) (observing that it is "beyond controversy that one of the duties which the citizen owes to his government is to support the administration of justice by attending its courts and giving his testimony"). Accordingly, this is not a situation in which there is "no relevant analogue to speech by citizens who are not government employees." *Garcetti*, 547 U.S. at 424. Government employees and non-government employees alike are called upon to give testimony when they possess knowledge of events that are relevant to the disposition of a government proceeding.

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based solely on their speech. *See Tenn. Secondary Sch. Athletic Ass'n v. Brentwood Academy*, 551 U.S. 291, 299-300 (2007) (applying *Pickering* balancing to speech by a private high school); *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712 (1996) (same with regard to corporate contractor's refusal to support particular political candidates). Thus, as used in *Garcetti* and its progeny, "citizen speech" denotes—not the identity or intent of particular speakers—but a class of speech that is not subject to the public employer's traditional exercise of legitimate proprietary control because of the public concerns that are implicated by the speech.

Furthermore, even if an employee's truthful testimony has some effect on government operations, that does not mean that the government employer would have a legitimate proprietary interest in controlling or punishing the speech. *See Rankin v. McPherson*, 483 U.S. 378, 388 (1987) (noting that a government employer's restriction on employee speech must be "justif[ied] . . . on *legitimate* grounds") (emphasis added). As the Seventh Circuit has correctly observed: "Even if offering (adverse) testimony is a job duty, courts rather than employers are entitled to supervise the process. A government cannot tell its employees what to say in court, *see* 18 U.S.C. § 1512, nor can it prevent them from testifying against it." *Fairley v. Andrews*, 578 F.3d 518, 525 (7th Cir. 2009).[6]

Finally, granting protection to truthful sworn testimony would not commit "courts to a new, permanent, and intrusive role, mandating judicial oversight of communications between and among government employees and their superiors." *Garcetti*, 547 U.S. at 423. Courts already supervise the setting and process for taking testimony, and adjudicating a claim that an em-

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[6] It is for this reason that one of *Garcetti*'s core concerns—that protecting certain employee speech would be "inconsistent with sound principles of federalism and the separation of powers," 547 U.S. at 423—is completely inapplicable to truthful sworn testimony. In those instances, it is the *failure* to protect such speech that threatens to upset the separation of powers, namely, by allowing one branch of government (often the executive) to leverage its authority as employer in a manner that undermines the functioning and integrity of another branch, such as the judiciary. *See In re Michael*, 326 U.S. 224, 227 (1945) (noting that perjured testimony "is at war with justice" because it can cause a court to render a "judgment not resting on truth").

ployee has been subjected to retaliation for truthful sworn testimony involves no "displacement of managerial discretion by judicial supervision." *Id.*

Respondent Burrow, however, contends that *Garcetti*'s concern for a public employer's proprietary interest remains "just as relevant when an employee testifies in court." Br. of Resp. Burrow at 23. Burrow notes, for example, that an employee's truthful testimony might reveal some kind of misconduct or malfeasance that should not be insulated from employer discipline. Such concerns are misguided. To hold that the First Amendment protects an employee from being subjected to retaliation for having given truthful testimony would *not* bar an employer from disciplining or firing an employee for *conduct* that was revealed in such testimony.

C. This Court Should Hold as a Rule That a Government Employer May Not Discharge or Otherwise Punish a Public Employee in Retaliation for the Message She Conveyed in Truthful Sworn Testimony.

1. As we have shown, there is no justification for categorically licensing a public employer to retaliate against employees for giving truthful sworn testimony, regardless of whether such testimony was given as part of the employee's job duties. Instead, such retaliation against protected speech must, at least, be scrutinized according to the balancing of interests prescribed by this Court's decision in *Pickering*. And, from our discussion up to this point, the result of that balancing should be obvious: apart from extraordinary circumstances that are absent both here and in the vast mine run of public-employee-testimony cases, the balancing of interests

tips decisively in favor of protecting the employee speech.

Pickering mandates an evaluation of the "balance between the interests of the [public employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of public services it performs through its employees." 391 U.S. at 568. In conducting that balancing of interests, this Court has noted that "the manner, time, and place of the employee's expression" and "the context in which [it] arose" are also relevant. *Rankin*, 483 U.S. at 388.

The interests of an employee in providing truthful sworn testimony are obviously significant. The obligation to provide such testimony is a civic duty of the highest order. *See Blair*, 250 U.S. at 281; *Blackmer*, 284 U.S. at 438. Moreover, if an employee were to yield to employer pressure to forsake giving truthful testimony, the result would be tremendous personal jeopardy for the employee. *See* 18 U.S.C. § 1621 (federal offense of perjury); *see also Havens*, 446 U.S. at 626 ("[W]hen defendants testify, they must testify truthfully or suffer the consequences.").

Together with the employee's interest in being free to testify truthfully, the public has a vital interest in receiving the benefit of truthful testimony, which extends not only to the subject matter of testimony in a particular case but also to the proper administration of justice in general. *See Nixon*, 418 U.S. at 709. The combined interests that favor protecting sworn testimony against employer retaliation are therefore of great weight.

In contrast, a government employer's legitimate and efficiency-based interests in restricting or punishing an

employee's truthful sworn testimony will—if they exist at all—be vanishingly small. A government employer certainly has no legitimate interest in suborning perjury. *See Fairley*, 578 F.3d at 525. And, any legitimate interest the employer might have in the testimony is attenuated by the fact that the testimony is given in a governmental proceeding that furnishes a context and manner of delivering speech that is outside the traditional supervisory realm of a workplace. *See Rankin*, 483 U.S. at 388.

Respondent Burrow complains that lower court decisions have "given exceedingly short shrift to the *Pickering* balancing test when addressing employee testimony." Br. of Resp. Burrow at 28 (citing, *Chrzanowski v. Bianchi*, 725 F.3d 734, 741-42 (7th Cir. 2013), *petition for cert. filed*, 82 U.S.L.W. 3282 (U.S. Oct. 18, 2013) (No. 13-1498), and *Reilly v. Atlantic City*, 532 F.3d 216, 231 (3d Cir. 2008)). But such treatment is well deserved when, even by Burrow's own admission, a government employer's legitimate interests will "rarely" outweigh the employee's interest in giving truthful sworn testimony. *Id.*

Burrow posits a handful of scenarios in which she maintains that a government employer's interests might be significant enough to warrant retaliation against an employee for sworn testimony. But Burrow's hypotheticals do not withstand analysis. For example, Burrow suggests that a police officer's testimony might cause such discord with another officer that the two "can no longer work together," and the employer should therefore be "free to reassign, demote, or fire" the testifying officer. *Id.* This begs the question why, if a reassignment were in order in such circumstances,

the officer to be reassigned should be the one who, without fault, was called upon to give truthful testimony. In any event, it is doubtful that a mere reassignment of partners would be a sufficiently adverse action to support a First Amendment claim. *Cf. Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 71 (2006). And, given that such measures would address any concern about strife between officers, the employer would not have a sufficiently weighty interest to demote or fire the testifying officer.

Burrow also recycles the prospect that an employee's sworn testimony might reveal misconduct, incompetence, or other facts that would warrant discipline or discharge. But, as we have explained, it would not be retaliation for an employer to take action based on *conduct that was revealed* as a result of truthful testimony. A claim would arise only when the motivation for the adverse action was the employer's desire to retaliate against the employee for telling the truth under oath.

2. Given the considerations detailed above, this Court should hold that a public employee's truthful sworn testimony is broadly protected against employer retaliation.

A broadly protective rule will ensure that public employees can properly discharge their duties when called upon to testify. Respondent Burrow has been unable to describe any situation in which the legitimate interests of a government employer would be served by retaliating against an employee due to the employer's desire to suppress the message the employee truthfully conveyed under oath. Perhaps the mind of man is capable of imagining such a situation, although none occurs to us. But the mere theoretical possibility that some such unusual

circumstance might arise does not justify any rule by this Court that truthful testimony is not protected. Just as public employees should be free to testify without fear of a subsequent damages action, *see Briscoe v. LaHue*, 460 U.S. 325 (1983), so too should an employee be able to testify free of the uncertainty and apprehension of potential disciplinary action that might make the employee distort or shade this testimony in order to please an employer who does not wish the truth to be known, *see id.* at 333-34.

A great deal rides on enabling government employees to carry out these civic duties faithfully, without being dissuaded by fear of retaliation. There are tens of millions of individuals employed in the public sector nationwide, the largest categories of whom are in education, health and hospitals, and police protection.[7] These three categories alone made up sixty-four percent of all public employees, or approximately 14.2 million of the 22.2 million people employed in the public service in this country.[8] And within these three categories are millions of potential witnesses in any number of judicial or other proceedings.

In most states, educators—a category that includes teachers, principals, school nurses, administrators, school social workers, and guidance counselors—are obligated to report suspected child maltreatment or

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[7] *See* U.S. Census Bureau, *Annual Survey of Public Employment & Payroll Summary Report: 2011* at 3-4 (Aug. 22, 2013), *available at* http://www2.census.gov/govs/apes/2011_summary_report.pdf.

[8] *Id.*

abuse.[9] Such reporting often results in those educators being asked to appear in court as witnesses.[10] Similarly, many states require hospital personnel and law enforcement to report suspected abuse, again likely resulting in requests to testify.[11] Teachers may also be called to testify in administrative hearings dealing with matters arising under the Individuals with Disabilities Education Act,[12] hospital workers may have necessary information pertaining to hospital sanitation or medical malpractice claims, and police officers will undoubtedly be involved in a range of matters that lead to the giving of sworn testimony, including the circumstances surrounding the arrest and detention of suspected or convicted criminals, or fraud or corruption involving other officers or police personnel.

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[9] U.S. Dep't of Health & Human Servs., *The Role of Educators in Preventing and Responding to Child Abuse and Neglect*, at 29-30 (2003), *available at* https://www.childwelfare.gov/pubs/usermanuals/educator/educator.pdf.

[10] *Id.*

[11] *See, e.g.*, Mich. Comp. Laws § 722.623 (requiring physicians, physician's assistants, medical examiners, nurses, individuals licensed to provide emergency medical care, and other health care professionals, as well as law enforcement officers, to report suspected child abuse or neglect); Va. Code Ann. § 63.2-1509 (establishing reporting requirements for "[a]ny person licensed to practice medicine," "[a]ny hospital resident or intern, and any person employed in the nursing profession," a number of other health-related professionals, and "[a]ny law-enforcement officer").

[12] *See* 20 U.S.C. § 1415 (authorizing procedural safeguards under the Act, including the ability to file a complaint and an opportunity for an "impartial due process hearing").

Other categories of public employees also are likely to be essential witnesses in a variety of proceedings. Corrections officers may be indispensable witnesses in proceedings stemming from civil rights complaints filed by inmates. Fire protection employees may be needed to testify regarding the causes of a fire. Electric, gas, or water supply employees may be called upon to provide information regarding utility failures or accidents that result in government investigations or civil lawsuits.

If each of these 22.2 million government workers feared retaliation by his or her employer for providing truthful sworn testimony in judicial or other proceedings, the integrity and functioning of government processes would suffer serious damage.

Where the interests of employees and the public at large weigh so obviously in favor of protecting the exercise of First Amendment rights, this Court has not hesitated to create rules that provide broad protection. For example, when it comes to employer policies that amount to political patronage or party-affiliation requirements, this Court has declared such arrangements unlawful without requiring a detailed case-by-case analysis. *See Rutan v. Republican Party*, 497 U.S. 62 (1990); *Branti v. Finkel*, 445 U.S. 507 (1980); *Elrod v. Burns*, 427 U.S. 347 (1976). The same has been true for employer-mandated declarations of religious belief, *see Torcaso v. Watkins*, 367 U.S. 488 (1961); for loyalty oaths, *see Elfbrandt v. Russell*, 384 U.S. 11 (1966); and for political oaths, *see Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967).

Here, as in those other contexts, a rule that leaves an individual uncertain whether he can speak the truth without being subjected to punishment is insufficient

to protect the important First Amendment interests at stake. Accordingly, this Court should hold without reservation that truthful sworn testimony by public employees enjoys First Amendment protection against employer retaliation.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 13-483

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Supreme Court of the United States

EDWARD R. LANE,

Petitioner,

v.

STEVE FRANKS, IN HIS INDIVIDUAL CAPACITY, AND SUSAN BURROW, IN HER OFFICIAL CAPACITY AS ACTING PRESIDENT OF CENTRAL ALABAMA COMMUNITY COLLEGE,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL WHISTLEBLOWER CENTER IN SUPPORT OF THE PETITIONER

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STATEMENT OF INTEREST

Founded in 1988, the National Whistleblower Center (NWC)[1] is a nonprofit, non-partisan, tax-exempt, charitable, and educational organization dedicated to the protection of employees who report misconduct in the workplace. *See* www.whistleblowers.org.

As part of its core mission, the NWC regularly monitors major legal developments in whistleblower law and files "Friend of the Court" briefs in federal and state courts and administrative agencies. Since 1990, the Center has participated before this Court as *amicus curiae* in cases that directly impact the rights of whistleblowers, including, *English v. General Electric*, 496 U.S. 72 (1990); *Haddle v. Garrison*, 525 U.S. 121 (1999); *Vermont Agency of Nat. Resources v. U.S. ex rel. Stevens*, 529 U.S. 765 (2000); *Beck v. Prupis*, 529 U.S. 494 (2000); *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002); *Doe v. Chao*, 540 U.S. 614 (2004); *FAA v. Cooper*, 566 U.S. ___, 132 S.Ct. 1441 (2012); and *Lawson v. FRM, LLC*, 571 U.S. ___ (March 4, 2014).

Persons assisted by the NWC, including employees who work for state and local government

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[1] Pursuant to Rule 37.6, the NWC states that counsel of record for all parties gave consent to the filing of this brief. No monetary contributions were accepted for the preparation or submission of this *amicus curiae* brief, and the NWC's counsel authored this brief in its entirety.

entities, have a direct interest in the outcome of this case. The ability of employees to testify before federal Grand Juries and in criminal proceedings, free from intimidation, is of paramount importance to whistleblowers, who are often witnesses in such proceedings. Furthermore, whistleblowers are often called to testify in other court proceedings regarding their allegations of fraud or misconduct. Likewise, in order for whistleblowers to defend themselves in court from illegal retaliation, witnesses who are called on their behalf to testify, and who work for state or local governments, must be fully protected from any retaliation.

SUMMARY OF THE ARGUMENT

A public employee cannot be subjected to retaliation on the basis of testimony before a federal Grand Jury or testimony in a criminal proceeding pending in federal court. The First Amendment protects public employee speech on matters of "public concern" and "limits the ability of a public employer to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens." *Garcetti v. Ceballos*, 547 U.S. 410, 418-19 (2006).

Evidence in federal criminal proceedings is unquestionably a matter of "public concern." Criminal laws are enacted by the elected representatives of the People to reflect standards of conduct, the

abridgment of which is, by their very nature, a subject of "public concern."

The duty and right to testify in criminal proceedings has also long been recognized as a duty and right of citizenship: "It is the duty and the right . . . of every citizen, to assist in prosecuting, and in securing the punishment of, any breach of the peace of the United States." *In re Quarles*, 158 U.S. 532, 535 (1895). The right to give relevant and admissible evidence in court proceedings is not simply a private right of the witness, but arises from the "necessity of the government itself," which demands that all such testimony be "free" from "adverse influence." *Id.*, p. 536.

In the context of a citizen's right to testify when called before a Grand Jury, over 125 years ago this Court held that: "The avenue to the grand jury should always be free and unobstructed." *Vogel v. Gruaz*, 110 U.S. 311, 315 (1884). The right to testify in criminal proceedings was viewed as part of the right and "duty of every citizen of the United States to communicate to his government any information which he has of the commission of an offense against its laws." *Id.*, p. 316.

When a "citizen enters government service," the pre-existing duty to "communicate to his government" information about potential crimes, including providing testimony about those crimes, is not negated or abridged. The right and duty is intrinsic

in citizenship itself and the fact that the citizen also holds a government job is immaterial to that right.

As this Court correctly held in *Garcetti*: "The First Amendment limits the ability of a public employer to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens." *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006). Every citizen enjoys the liberty to provide testimony about potential crimes in the courts of the United States. *Vogel v. Gruaz*, 110 U.S. 311, 316 (1884), *citing Dawkins v. Rokeby*, L.R. 8 Q.B. 255, 265 (1873).

Speech related to providing information to the government (including prosecutors, judges, and jurors performing their government-related and sponsored civic duty) does not "owe its existence to a public employee's professional responsibilities." *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006). Any person who has evidence of criminal wrongdoing (or evidence that a person charged with a crime may be innocent) has a right and duty to provide that evidence to the appropriate government and judicial authorities, irrespective of any employment relationship whatsoever. To interfere with that right violates the fundamental public policy that underlies the U.S. Constitution and is criminal unto itself. 18 U.S.C. § 1514(e).

In *Garcetti*, the speech at issue was radically distinct from the speech at issue in this case. The speech in *Garcetti* was not made because the employee was exercising his rights as a "citizen," but instead

was simply part of the employee's "daily professional activities" for which he was paid to perform as a civil servant. *Garcetti*, 547 U.S. at 422. Testifying before a Grand Jury or in a federal criminal proceeding is not part of a typical public employee's "daily professional activities." *Id.* A citizen's right to testify in federal criminal proceedings is not tethered or connected to his or her government job. The right to testify is a right inherent in citizenship and exists regardless of any government position the citizen so happens to occupy.

Under the *Garcetti* precedent, Mr. Lane's testimony before a federal Grand Jury and in a related criminal proceeding constitutes protected speech under the United States Constitution.

ARGUMENT

UNDER *GARCETTI*, PETITIONER EDWARD LANE'S TESTIMONY BEFORE A FEDERAL GRAND JURY AND DURING A FEDERAL CRIMINAL PROCEEDING CONSTITUTED PROTECTED SPEECH UNDER THE UNITED STATES CONSTITUTION

In order for the speech of a government employee to be protected under the United States Constitution, it must satisfy the following "two inquiries": (1) whether the speech is of a matter of "public concern"; and (2) whether the "relevant government entity" has an "adequate justification for treating the

employee differently from any other member of the general public." *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006). Additionally, a Court must inquire whether or not the speech was part of the employees "daily professional duties" or performed as part of the "tasks he was paid to perform." *Id.*, at 421.

As set forth below, Edward Lane's speech before a federal Grand Jury, and during a federal criminal trial, was a matter of public concern. His Grand Jury and in-court testimony was not part of his "daily professional duties." His employer had no justification for treating him any differently from any other citizen who testified in the criminal proceedings.

Moreover, citizens are not paid for their testimony in federal criminal proceedings. In point of fact, any connection between pay and testimony could give rise to witness tampering and/or an obstruction of justice. Consequently, Mr. Lane's speech in the criminal proceedings was fully protected under the U.S. Constitution.

I. Mr. Lane's Speech was of Public Concern and Protected as a Fundamental Right of Citizenship

Mr. Lane gave testimony in two federal criminal proceedings. The first was testimony in a Grand Jury proceeding. Thus, pursuant to federal Grand Jury procedure, the federal prosecutor would have called Mr. Lane as a witness before the Grand Jury. Presumably, the prosecutor concluded that Mr. Lane had

evidence relevant to the violation of a federal law. Testimony about actual or potential violations of law is a matter of public concern. *Garcetti*, 547 U.S. at 417-18 ("the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern").

As this Court has long held, it is a fundamental right of "every citizen to communicate to his government any information which he has of the commission of an offense against its laws." *Vogel v. Gruaz*, 110 U.S. 311, 316 (1884). This right and duty of citizenship includes the right of citizens to testify in courts of law. In *Vogel*, the Supreme Court specifically cited to the case of *Dawkins v. Rokeby*, L.R. 8 Q.B. 255 (1873), as precedent for this right. In *Dawkins*, the Court of Queen's Bench explained the importance of protecting testimony from any improper influences:

> . . . there is the further overwhelming reason that witnesses are protected from actions for what they may have stated in evidence in a court of justice; otherwise, everybody in the witness-box would speak in fear of litigation; *and no man who is called to give evidence would be safe from some troublesome action being brought against him.*

Dawkins, L.R. 8 Q.B. at 265 (emphasis added).

Testimony in court is speech that is a matter of public concern and that unquestionably owes its existence to the duty of citizenship. *Accord*, *In re Quarles*, 158 U.S. 532, 535-36 (1895) ("It is the duty

and right . . . of every citizen, to assist in prosecuting . . . any breach of the peace."). This duty of citizenship is not a duty that arises as a term or condition of employment.

II. No Government Entity Can Justify Treating an Employee differently from a Citizen when the Employee Performs his Civic Duty to Testify in Federal Criminal Proceedings

The second inquiry this Court must undertake to determine whether Mr. Lane's testimony in two criminal proceedings was constitutionally protected focuses on the Respondent's "justification" for "treating the employee differently from any other member of the general public." *Garcetti*, 547 U.S. at 418. No such justification exists.

It is well established that a person's right to provide "information" to the "proper authority of any misconduct, frauds or misdemeanors committed by any person in the service of" the "states" is part of the fundamental law of the United States, and is inherent in the U.S. Constitution. Resolution of July 30, 1778, Vol. XI *Journals of the Continental Congress* 732 (Washington: Government Printing Office, 1908); *In re Quarles*, 158 U.S. at 535-36 ("It is the duty and right . . . of every citizen, to assist in prosecuting . . . any breach of the peace."); *Vogel*, 110 U.S. at 316 (1884), *citing Dawkins*, L.R. 8 Q.B. at 265 (1873).

The right to testify in such proceedings is a "freedom" inherent in citizenship for which no public

employer can reasonably set "limitations." *Garcetti,* 547 U.S. at 418. It is a "freedom" inherent in "citizenship" and any attempt by a public employer to assert "control" over its employees' "words and actions" when testifying in a federal criminal proceeding would be highly inappropriate and most likely would constitute a criminal obstruction of justice. The "words" spoken by a witness to a Grand Jury or before a federal court in a criminal proceeding are controlled by the oath the witness swears, not by any sense of loyalty or duty to a public employer.

Even more significant is the "leverage" issue identified by this Court in *Garcetti*. *Id.*, at 419. It is well understood that a public employer can leverage employment opportunities in order to lawfully control the work-related activities of an employee. However, this power to leverage employee speech is limited by the U.S. Constitution: "The First Amendment limits the ability of a public employer to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens." *Id.*

Nowhere are the "liberties" "enjoyed" by public employees in their "capacities as private citizens" more implicated than in the liberty and freedom of any person to freely, truthfully, and completely testify in a criminal proceeding. Such testimony is essential in order to ensure that the guilty are convicted and held accountable for their crimes and that the innocent are freed. It would be shocking to permit a public employer to "leverage the employment relationship"

in order to influence, "incidentally or intentionally," the truthful testimony of a citizen who happens to also be a public employee. *Garcetti*, 547 U.S. at 419.

III. Mr. Lane's Testimony before the Grand Jury and in a Federal Criminal Proceeding was Not Part of his "Daily Professional Activities"

A citizen's testimony before a federal grand jury, or at a federal criminal trial, is *not* part of an employee's job duties. It arises from the duty every citizen owes his country and the freedom every citizen maintains to inform the appropriate authorities of crimes committed against the People. As this Court has long recognized, this freedom is part of the fundamental structure of the Constitution itself. *In re Quarles*, 158 U.S. at 535-36.

This case bears no resemblance to the facts at issue in *Garcetti*. The plaintiff in the *Garcetti* case, Mr. Richard Ceballos, engaged in "speech" inside his workplace office, not in a court. *Garcetti*, 547 U.S. at 420. While Ceballos "spoke" to his supervisor, Mr. Lane "spoke" to prosecutors, judges, lawyers, and jurors who, obviously, were not in Mr. Lane's chain of command. He also spoke to members of the public who, under the U.S. Constitution, have a right to attend criminal trials.

Furthermore, Mr. Ceballos' speech "owe[d] its existence" to the fact that Mr. Ceballos was performing his "professional responsibilities" at work. *Id.*, at

421. Mr. Ceballos' speech was made as part of his "duties" to "advise his supervisor about how to best proceed" with a work-related duty. *Id.* By contrast, Mr. Lane's testimony owed its existence to his willingness to perform a *civic* duty. Mr. Lane was not advising his "supervisor" about how better to perform his job. Rather, he was testifying in a court about the crimes committed by his supervisors and providing evidence that could result in his supervisors going to prison for mail fraud and fraud in the expenditure of federal funds.

As this Court pointed out in *Garcetti*, Mr. Ceballos "did not act as a citizen when he went about conducting his daily professional activities." 547 U.S. at 422. However, Mr. Lane did act as a citizen when he upheld one of the most important duties of citizenship and testified in two criminal proceedings. *In re Quarles*, 158 U.S. at 535 ("It is the duty . . . of every citizen, to assist in prosecuting, and in securing the punishment of, any breach of the peace of the United States."). That the accused happened to be Mr. Lane's supervisors does not convert Mr. Lane's duty of citizenship to testify truthfully before a Grand Jury and criminal court into a part of his daily job duties.

CONCLUSION

Under this Court's precedent in *Garcetti*, Mr. Lane's testimony in two federal criminal proceedings was fully protected under the Constitution of the United States and its First Amendment.

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